WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOL. I

WISCONSIN
CRIMINAL
JURY INSTRUCTIONS
COMMITTEE

UNIVERSITY OF WISCONSIN
LAW SCHOOL

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME I

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

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INSTRUCTIONS
CRIMINAL

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INTRODUCTION

[This introduction was approved in 2018. It condenses and combines the introductory and prefatory material that was previously published, and updates that material.]

The Wisconsin Jury Instructions-Criminal is the product of a cooperative effort between the Criminal Jury Instructions Committee and the University of Wisconsin. The partnership began in 1960 with an informal agreement between the University of Wisconsin-Extension, Department of Law, and the Board of Criminal Court Judges, then the parent body for the Committee. In 1978, the Wisconsin court system was reorganized and the old statutory boards, including the Board of Criminal Court Judges, were abolished. The Criminal Jury Instructions Committee was reconstituted as a standing committee of the Criminal and Traffic Section of the Wisconsin Judicial Conference. In 1986, the University of Wisconsin-Extension, Department of Law, was integrated with the University of Wisconsin Law School as its Office of Continuing Education and Outreach. In 2016, that office was renamed Continuing Education and External Affairs. Despite the structural changes in both the courts and the University, the cooperative effort has continued without interruption.

The project's origin is related to the adoption of a new Wisconsin Criminal Code in 1956 and several of the original Committee members and advisors had been leaders in that undertaking. The Board of Criminal Court Judges concluded that the newly-defined crimes required new jury instructions and that it was no longer sufficient to rely on instructions that may have been passed along informally from judge to judge. The Introduction to the 1962 Edition explained:

> The Wisconsin Board of Criminal Court Judges, realizing that no ready reference work was available to assist the bench and bar in the preparation of jury instructions in criminal cases, authorized and directed [the Committee] . . . to study the problem and submit to the Board such suggested instructions as, in the Committee's opinion, would assist judges and trial lawyers in the submission of criminal cases to juries.
>
> These were the Committee's principal objectives:
>
> 1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful and helpful to the jury.
> 2. To make readily available such instructions as a trial judge would likely need in the trial of a criminal case to a jury.
> 3. To revise instructions that had been in general use prior to the enactment of the Criminal Code of Wisconsin, which became effective July 1, 1956, and to make such changes

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therein as seemed to be advisable as a result of such enactment; and, generally, to relate the instructions to the new Criminal Code.

4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.

Introduction To The 1962 Edition – Judge Gerald Boileau, Chairman Committee on Jury Instructions – Criminal

When the first edition was published in 1962 it was dedicated to the Committee's first chair, Circuit Judge Gerald Boileau from Wausau.

DEDICATION

The following resolution was unanimously passed by the Wisconsin Board of Criminal Court Judges at its annual meeting in June of 1961:

> WHEREAS, the Hon. Gerald J. Boileau has been the only Chairman of the Board's Committee on Criminal Jury Instructions, and;
>
> WHEREAS, the monumental work of this Committee, which will ultimately lead to the publication of model instructions for the use of this State, is due largely to the untiring and dynamic leadership of the Hon. Gerald J. Boileau, and;
>
> WHEREAS, the Hon. Gerald J. Boileau has in the past made significant contributions to the advancement of his profession in that he has been Chairman of the Wisconsin Board of Circuit Judges, Chairman of the Wisconsin Board of Criminal Court Judges, a member of the Judicial Council of this State for many years, and Chairman of the Criminal Code Advisory Committee which drafted the new Criminal Code in its final version;
>
> Be it therefore, resolved, that when Wisconsin Jury Instructions – Criminal is published, it be dedicated to the Hon. Gerald J. Boileau in recognition of his interest, his advice, and his time so freely given to his profession.

Expectations for how the instructions should be used were set out in the Preface to the original edition and remain accurate today.

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Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. While the general instructions and the instructions on defenses and defensive matters may frequently be used without change, instructions on the substantive offenses may often have to be modified to fit the needs of the particular case. The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered. When, for example, conspiracy or solicitation is submitted, it may be necessary to modify the instructions.

It is suggested that the comment and the footnotes be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Words and phrases which are to be used alternatively appear in parentheses and italics. Words and phrases which are not appropriate to every case, but which should be given in some situations, are in brackets. Editorial directions which alert the user to alternatives or to the need to insert material or other instructions are found in brackets in the body of the instruction or in the comment.

The book itself may be cited as "Wis JI-Criminal" and each instruction by adding the appropriate number. . . . It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he point out the nature of the change and the reason therefore.

PREFACE TO THE 1962 EDITION
John H. Bowers, Editor

As mentioned, several of the original members and advisors had strong ties to the development of the 1956 Criminal Code. The original judge members were:

Hon, Gerald J. Boileau, Wausau, Chairman
Hon. Herbert J. Steffes, Milwaukee
Hon. William E. Gramling, Waukesha
Hon. Milton L. Meister, West Bend
Hon. Clarence Whiffen, Racine
Hon. Henry Gergen, Beaver Dam [replaced Judge Whiffen in 1961]

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The original advisory members were two outstanding criminal law experts: Assistant Attorney General William A. Platz and Professor Frank J. Remington. In speaking about them, the 1966 foreword stated: "The Committee could have found no better qualified individuals than William Platz and Frank Remington for technical advisors. Suffice it to say that the aid of these two men has been invaluable."

William Platz's contributions were further described in an in memoriam tribute published in 1980:

> William A. Platz had no peer in the field of criminal law. For nearly four decades, he was counsel to every district attorney and every law enforcement officer in the State of Wisconsin, always available and willing, cheerfully, to give advice. And no more knowledgeable, trustworthy help was available anywhere.
>
> He possessed not just a singular knowledge and devotion to the justice system but a keen wit and fine sense of humor as well. His wit and wisdom forever remain with all who knew this fine outstanding man.

Frank Remington's efforts were recognized in the foreword to the 1966 supplement:

> Frank Remington has such impressive credentials in the field of criminal law that we need not spell them out here. He was one of the principal researchers on the massive revision of the Wisconsin Criminal Code. As a member of the Law School faculty since 1949, he has been specializing in the study of criminal law. He has brought nationwide distinction to the Law School as a center for research and teaching in criminal law and the administration of criminal justice.

John H. Bowers was the original editor/reporter for the publication. The Introduction to the 1980 Edition recognized his contributions:

> The Committee has been fortunate to have the services of John H. Bowers, Attorney at Law, Madison, and former Deputy Attorney General, State of Wisconsin, as reporter and editor from 1961 through 1976. During that time John was responsible for most of the reporting and drafting chores. His services over the years have been of the greatest importance.

Although the original conception of the project may have anticipated that the Committee would finish its work once the new Criminal Code was addressed, that proved not to be the case. After the publication of the original edition in 1962, supplements were published in 1966, 1967, 1971, 1974, and 1976. A new edition was published in 1980,

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increasing the page size of the hard copy to 8 1/2 by 11 from the original 6 by 9. As of July 2019, 57 supplements have been published to the 1980 edition.

Inquiries and suggestions from judges and lawyers are among the most important sources of new business for the Committee. It is always informative to receive questions and suggestions from those the Committee is trying to serve. You are encouraged to contact the reporter by phone, mail, or e-mail, or to consult with any member of the Committee. Copies of approved-but-not-published material are available from the reporter, as are working drafts.

A list of all judges who have served on the Committee and a list of advisory members and editors is provided beginning on the following page. Current members and advisors are listed on the title page.

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948.04	2116
948.05(1)(b)	2120, 2120A
948.05(1m)	2122
948.05(2)	2123
948.05(3)	2120A
948.051	2124
948.055	2125
948.06(1)	2130
948.06(1m)	2131
948.07	2134, 2134A, 2134B
948.075	2135
948.08	2136
948.081	2136A
948.085	2137A, 2137B
948.09	2138
948.093	2138A
948.095	2139, 2139A
948.10	2140, 2141
948.11(2)(a)	2142, 2142A
948.11(2)(am)	2143
948.11(2)(c)	2142A
948.12(1m)	2146A, (2146 INSTRUCTION WITHDRAWN)
948.12(2m)	2146B
948.13	2147
948.14	1984, 2196
948.20	2148
948.21	2150, 2150A
948.215	2151
948.22	2152, 2152A
948.23(1)(a)	2154
948.30(1)(a)	2160
948.30(1)(b)	2161
948.30(2)(a)	2162
948.30(2)(b)	2163
948.31(1)(b)	2166
948.31(2)	2167, 2167A
948.31(3)(a)	2168
948.31(4)	2169
948.40(1)	2170, 2170A
948.40(2)	2171
948.45	2173
948.53(2)(a)	2175
948.55(2)	2185
948.60	2176, 2177
948.60(2)(c)	2177A
948.605(2)	2178A
948.605(3)	2178B
948.61	2179
948.62	2180
951.02	1980
951.03	1983
951.08	1986, 1988
951.095	1981
951.13	1982
951.14	1984
951.18(1)	1983
951.18(2m)	1981
961.01(4m)	6005, 6020A
961.41	6031
961.41(1)	6001, 6020, 6020A, 6021
961.41(1m)	6001, 6035, 6036
961.41(3g)	6030, 6031
961.41(4)(am)	6040
961.41(4)(bm)	6042
961.42	6037, 6037A, 6037B
961.43(1)(a)	6038
961.437(2)(a)	6044
961.455	6046, 6047
961.46	6002
961.465	6003
961.49	6004
961.573(1)	6050
961.573(3)	6053
961.65	6065
968.06	(SM-10 INSTRUCTION WITHDRAWN)
968.075(5)	2044
968.12,.13	(SM-62 INSTRUCTION WITHDRAWN)
968.26	SM-12
968.27-.33	(SM-62 INSTRUCTION WITHDRAWN)
969.01(2)	SM-30A
969.01(2)(b)	(SM-39 INSTRUCTION WITHDRAWN)
970.02	SM-25, SM-30
970.03	SM-31
971.04	SM-18
971.08	SM-32
971.11(2)(b)	1200G
971.12(3)	220, 220A, 220B
971.14	SM-50
971.15-.175	600-662
971.17(1)	SM-50A
971.19(1)	267

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971.20	(SM-15 INSTRUCTION WITHDRAWN)
971.31	(SM-60, SM-61, SM-62 INSTRUCTIONS WITHDRAWN)
972.01	SM-20
972.08	246, SM-55
972.10(1)	55, 56, 101, 102
972.11(2)(b)2	1200G
973.01-.17	SM-34
973.015	SM-36
973.15(8)	SM-30A, SM-39
973.155	SM-34A
974.06	(SM-70, SM-33B INSTRUCTIONS WITHDRAWN)
975.01, et al.	(1550-1553, SM-40 INSTRUCTIONS WITHDRAWN)
975.17	SM-41
976.05	SM-90
Ch. 980	2501, 2502, 2503, 2505, 2506

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1 SUGGESTED INSTRUCTIONS

The suggestions made here are recommendations only, intended to offer some guidance as to a logical order for assembling the instructions. Individual practices may vary and may be equally effective.

Instructions with titles in boldface are those the Committee recommends be given in every case. The other instructions should be given when supported by the evidence. Not all possible general instructions are listed here. Omitted are those that are especially tied to unusual or rarely-occurring factual situations.

50 Preliminary Instruction: Juror's Conduct; Evidence; Transcripts Not Available; Credibility; Substantive Issues; Opening Statement

100 Opening Instructions

110 - 125 Statement Of The Issues [Number Of Defendants; Lesser Included Offenses; Number Of Counts]

1010 - et seq. Instructions Defining The Crime Charged

Lesser Included Offenses

Defenses [JI 600 - 885, 950, 951]

Penalty Enhancers [JI 980 - 999A]

140 Burden Of Proof And Presumption Of Innocence

145 Information Not Evidence

247 Verdict As To Defendant Only

103 Evidence Defined

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162 Agreed Facts

165 Judicially Noticed Facts

170 Circumstantial Evidence

172 Flight, Escape, Concealment

175 Motive

180 Statements of Defendant

270 Evidence As To Defendant's Character

275 Evidence Of Other Conduct [**Required If Requested**]

157 Remarks of Counsel

154 Summary of Evidence

155 Exhibits

148 Objections of Counsel; Evidence Received Over Objection

147 Improper Questions

150 Stricken Testimony

190 Weight of Evidence

195 Juror's Knowledge

300 Credibility of Witnesses

315 Defendant Elects Not To Testify [**To Be Given Only If Requested By Defendant**]

317 Witness Exercising Privilege Against Self-Incrimination [**To Be Given Only If Requested; Required If Requested**]

141 Where Identification Of Defendant Is In Issue

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200 Expert Testimony: General

201 Opinion of Non-Expert Witness

205 Expert Testimony: Hypothetical Question

245 Testimony Of Accomplices

320 Impeachment Of Defendant By Prior Inconsistent Statements Which Are Inadmissible in the State's Case-In-Chief [**Required If Requested**]

325 Impeachment of Witness: Prior Conviction or Juvenile Adjudication

327 Impeachment Of Defendant As Witness: Prior Conviction or Juvenile Adjudication

340 Credibility Of Child Witness

160 Closing Arguments of Counsel

460 or 465 Closing Instruction

480 - 494 Verdict [Conform To Instruction Selected From 110 - 125]

515 Unanimous Verdict and Selection of Presiding Juror

520 Supplemental Instruction On Agreement

522 Polling the Jury

525 or 525A Instruction After Verdict Received

COMMENT

Wis JI-Criminal 1 was originally published as SM-5 in 1966. It was revised and republished as Wis JI-Criminal 1 in 1995 and revised in 2000 and 2011. This revision was approved by the Committee in October 2015; it reflected a change in the title of Wis JI-Criminal 180.

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5 COMMENT: GENDER NEUTRAL LANGUAGE

This is intended to explain the Committee's approach to the use of gender neutral language in the Wis JI-Criminal and to provide references for users who wish to use gender neutral language in revising or supplementing the published instructions.

Substantive Gender Bias

The Committee attempts to prepare instructions that are free from substantive gender bias. By substantive bias, we mean statements that indicate that one gender is to be treated differently from the other in applying the law as described in the instructions. An example would be indicating that a witness was less likely to be credible because of gender.[1]

Pronouns

The instructions as originally drafted followed then-accepted rules of grammar and statutory drafting in using the masculine form of pronouns to refer to antecedents of mixed or unknown gender.[2] While such usage is still defended by some as proper under the rules of grammar,[3] the Committee is aware that general use of the masculine form of pronouns is perceived as gender bias by some and therefore should be avoided.[4] The Committee is working to avoid use of the masculine form by redrafting, using one of several different techniques.[5]

All of the general instructions commonly used in most cases have been reviewed to eliminate the masculine form of pronouns and are republished in Release No. 28 (December 1991). Every other instruction that comes before the Committee is also being reviewed. The Committee has found that it is necessary to review each instruction individually to assure that no substantive change results from the change or elimination of a pronoun.[6]

References to the Defendant

The Wis JI-Criminal continue to use masculine pronouns to refer to the criminal defendant. This is not believed to implicate concerns of gender neutrality because it is expected that all such references will be changed when the case involves a female defendant. It has always been assumed by the Committee that the published instructions would be tailored to the facts of each case, including the modification of all pronouns to match their antecedents. Failure to do so may confuse the jury. See the dissenting opinion in Betchkal v. Willis, 127 Wis.2d 177, 190, 378 N.W.2d 684 (1985).

The instructions continue to use the masculine form to refer to the defendant solely for practical reasons: to avoid the clutter, confusion, and added length involved

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in using "he or she," "(he) (she)," or similar conventions throughout the instructions. It is beyond dispute that the overwhelming majority of criminal defendants are men. Using masculine pronouns in the published instruction allows using the instructions without change in most cases. This is believed to be a substantial advantage because using "(he) (she)" or a similar approach would require changing the published instruction in every case. With each change comes the opportunity for error or inadvertent mistake.

Where users encounter an instruction that has not yet been revised in accord with these principles, some of the techniques described in the notes below may help with any revision that may be required.[7]

COMMENT

Wis JI-Criminal 5 was approved by the Committee in December 1991.

Recommendations for revising the uniform jury instructions were made by the Civil Law Subcommittee of the Wisconsin Equal Justice Task Force. While that subcommittee focused on the Wisconsin Jury Instructions-Civil, one of its recommendations provided as follows:

> The Wisconsin Criminal Jury Instructions Committee should review and revise their instructions to remove gendered language and replace it with gender-inclusive or gender-neutral language and reformat the instructions to allow choices to particularize any instruction for a specific case.

Report of the Wisconsin Equal Justice Task Force, p. 24.

1. No instances of explicit substantive gender bias have been brought to the Committee's attention. To confront the danger of implicit gender bias, the Committee has recently published Wis JI-Criminal 50 which, in giving the jury general instruction on its duties, includes the following statement: "Do not let any personal feelings of bias or prejudice about such things as race, religion, national origin, sex, or age affect your deliberations." This was adapted from a recommendation found in Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts, 1989.

2. Section 990.001(2) provides: "Words importing one gender extend and may be applied to any gender."

3. See, for example, Younger, "The English Language Is Sex-Neutral," 72 ABA Journal 89 (1986). The author states that English grammar treats one word in every word-couple as the "unmarked usage" — the word that is used to refer to both sexes. With English pronouns, states Younger, this is the masculine form, the use of which does not raise concerns of sexism; it is "an aspect of the internal economy of English, nothing more."

4. The Committee believes it is following the view of most of the commentators on current usage in general and the law in particular. While the rules of grammar on the pronoun issue are described as unsettled, there is consensus that it is best to avoid the problem where it is possible to do so. See, for example, Garner, A Dictionary of Modern Legal Usage, p. 499 (Oxford, 1987); Melinkoff, Legal Writing: Sense and Nonsense, pp. 48-51 (West, 1982).

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5. Some of the common techniques are:

— rewriting to avoid the problem. Often, the pronoun or the phrase in which it appears can simply be dropped. Or the sentence can easily be rewritten to make the pronoun unnecessary.

— substitute nouns for pronouns. The instructions often suggest using the name or title of a person; repeating the name or title avoids use of a pronoun and adds clarity as well.

— substituting plural pronouns for a singular pronoun. Using "witnesses . . . their" in place of "witness . . . his" usually works well. The Committee does not believe it is grammatically correct to use the plural form where there is a singular antecedent, although such usage appears to be coming to be recognized as standard.

— substituting a gender neutral pronoun. Using "one" in place of "his" or "her" is grammatically correct but often increases the complexity of an instruction, making it more difficult to understand.

— using gender neutral terms. The instructions typically use "police officer" instead of "policeman," "firefighter" instead of "fireman," etc.

These and other techniques are summarized by Garner and Melinkoff in the texts cited in note 4, supra. Several other guides are also available. It has been the Committee's experience that rewriting can virtually always increase gender neutrality and clarity at the same time.

6. Changes in meaning can result if pronouns are changed without a careful eye on the substantive effect. For example, a criminal statute was revised several years ago to substitute "in personal possession" for "in his possession." See § 943.12, Possession of Burglarious Tools. One could argue that "personal possession" has a specific substantive meaning that changed the statute.

7. See note 5, supra.

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50 PRELIMINARY INSTRUCTION: JURORS' CONDUCT; EVIDENCE; TRANSCRIPTS NOT AVAILABLE; CREDIBILITY; SUBSTANTIVE ISSUES; OPENING STATEMENT

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. Do not let any personal feelings about race, religion, national origin, sex, or age affect your consideration of the evidence.

Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room.

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers, (interpreters) or witnesses do not speak with them. For their part, the parties, lawyers, (interpreters) and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene. Do not read any newspaper reports or listen to any news reports on radio or television about this trial. Do not consult dictionaries, computers, web sites or other reference materials

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for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone, or other electronic device with communication capabilities to share any information about this case. For example, do not communicate by blog, e-mail, text message, twitter, or in any other way, on or off the computer.

Do not permit anyone to communicate with you, and if anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone in any manner.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

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You are to decide the case solely on the evidence offered and received at trial.

EVIDENCE [WIS JI-CRIMINAL 103]

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.

Second, the exhibits the court has received, whether or not an exhibit goes to the jury room.

Third, any facts to which the lawyers have agreed or stipulated or which the court has directed you to find.

OBJECTIONS [ADD WIS-JI-CRIMINAL 148 IF DESIRED]

NOTETAKING [ADD WIS-JI-CRIMINAL 55 OR 56 IF DESIRED]

QUESTIONS BY JURORS [ADD WIS-JI-CRIMINAL 57 IF DESIRED]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY [WIS JI-CRIMINAL 58]

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

POLICE REPORTS [ADD WIS JI-CRIMINAL 59 IF DESIRED]

CREDIBILITY OF WITNESSES [WIS JI-CRIMINAL 300]

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It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

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SUBSTANTIVE INSTRUCTIONS — ELEMENTS OF THE CRIME

BURDEN OF PROOF [ADD WIS JI-CRIMINAL 140 IF DESIRED]

OPENING STATEMENTS [WIS JI-CRIMINAL 101]

The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

COMMENT

Wis JI-Criminal 50 was originally published in 1991 and revised in 1995, 1999, 2001, and 2003. This revision was approved by the Committee in December 2009.

The 2009 revision added cautions regarding use of computers, cell phones and other electronic communication devices and about communicating via blogs, e-mail, text messages, etc. See page 2. The Committee tried to integrate those cautions into the broader concerns addressed by the instruction: deciding the case only on the basis of evidence introduced at trial, not communicating with others about the case while it is pending, and not making up one's mind until all the evidence is in. Communication by jurors after the trial is concluded, whether or not by electronic means, is covered by the general rule that jurors may, but are not required to, discuss their jury service with anyone. See Wis JI-Criminal 525.

The Michigan Supreme Court has adopted a rule requiring judges to instruct jurors not to use electronic communication devices during trials. See, Amendment of Rule 2.511 of the Michigan Court Rules, June 30, 2009, ADM File No. 2008-33.

This instruction as originally published dealt only with juror conduct during the trial. The 1999 revision added the material relating to defining "evidence," credibility, substantive instructions, and opening statements. These are matters that, in the Committee's judgment, are most typically included in the preliminary instructions. Adding other general material or giving fewer instructions than recommended here are matters within the discretion of the individual trial judge. Practice apparently varies as to repeating the instructions included here as part of the final instructions in the case. The Committee concluded that the instructions defining the offense and the instruction on the burden of proof should always be included in the final instructions.

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55 NOTETAKING PERMITTED

You are not required to but you may take notes during this trial, except during the opening statements and closing arguments. The court will provide you with materials.

In taking notes, you must be careful that it does not distract you from carefully listening to and observing the witnesses.

You may rely on your notes to refresh your memory during your deliberations. Otherwise, keep them confidential. After the trial, the notes will be collected and destroyed.

COMMENT

Wis JI-Criminal 55 was originally published as Wis JI-Criminal 101 in 1983 and renumbered in 1991. It was republished without substantive change in 2000.

This instruction is drafted to implement § 972.10(1)(a).

Under the statute, the court must decide whether the jury should be allowed to take notes. The only Wisconsin decision discussing notetaking preceded the statute by several years, see Fischer v. Fischer, 31 Wis.2d 293, 142 N.W.2d 857 (1965).

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56 NOTETAKING NOT ALLOWED

Do not take notes during the trial. Taking notes will not be permitted in this case because:

[STATE REASONS].[1]

COMMENT

Wis JI-Criminal 56 was originally published as Wis JI-Criminal 102 in 1983. It was renumbered in 1991 and republished without substantive change in 2000.

1. If notetaking is not allowed, the court must state the reasons for the determination on the record. See § 972.10(1)(a)2.

The statute does not require that the stating of reasons be done in the presence of the jury, but it may be a good practice to tell the jurors why they are not being allowed to take notes.

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57 INSTRUCTION ON JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to submit written questions for the witnesses called to testify in this case. You are not encouraged to submit large numbers of questions because questioning witnesses is primarily the responsibility of counsel. Questions may be submitted only in the following manner.

After both lawyers have finished questioning a witness, and only at this time, if there are additional questions you would like the witness to answer you may then submit a written question for that witness. If you want to submit a question, simply raise your hand and the bailiff will collect your written question. Questions must be directed to the witness and not to the lawyers or the judge. After consulting with counsel, I will determine if your question is legally proper. If I determine that your question may properly be asked, I will ask it. If I do not allow a particular question to be asked, do not guess about what the answer might have been. Do not draw any conclusion from the fact that a question was not asked.

COMMENT

Wis JI-Criminal 57 was originally published in 1992 and republished without substantive change in 2000, when the comment was updated. This revision was approved by the Committee in October 2013; it revised the text and revised the comment to include material that formerly appeared in Special Material 8 Juror Questioning Of Witnesses.

This instruction is provided as a possible guide for those judges who wish to allow jury questioning of witnesses during trial. Questions to the judge from jurors during deliberations raise different issues.

There is no specific statutory or case law authority in Wisconsin requiring or prohibiting juror questioning of witnesses. The only appellate decision to consider the issue is State v. Darcy N. K., 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), where the court found that the failure to allow juror questions did not prejudice the defendant. This part of the decision is consistent with the conclusion that trial courts have implied or inherent authority to allow juror questioning. See § 906.11: "The judge shall exercise

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reasonable control over the mode and order of interrogating witnesses. . . ." The court also concluded that when juror questions are allowed, "a trial court should employ safeguards recommended by the Criminal Jury Instructions Committee." The court's decision incorporated Section III. Recommended Procedures if Questions are Allowed and Section IV. Jury Instructions from Special Material 8 Juror Questioning Of Witnesses [c. 1992].

The discussion below is a revision of material originally published in SM-8, which was withdrawn when its substance was incorporated here. Section III., referred to in Darcy N. K., appears under the heading Recommended Procedures if Questions are Allowed. The text of JI 57 contains a revised version of the instruction recommended in Section IV. of SM-8, also referred to in Darcy N. K.

Advantages and Disadvantages

a. Advantages
   i. Allows jurors to resolve issues that are important to them.
   ii. Brings out relevant material the lawyers missed.
   iii. Aids jury deliberations by reducing the number of uninformed jurors or resolving questions in the courtroom that would prolong or distract deliberations.
   iv. Increases juror attentiveness.
   v. Increases juror satisfaction; decreases frustration and discontent.
   vi. Helps lawyers direct their cases toward the issues jurors are concerned about.
   vii. Promotes compliance with the admonition that jurors are not to do research on their own.

b. Disadvantages
   i. Disrupts trial strategy of the lawyers who intentionally left a question unasked.
   ii. Jurors anticipate where the case is going and jump ahead of the lawyers.
   iii. Makes jurors less impartial and more partisan.
   iv. Questions may be to the disadvantage of clients.
   v. Disrupts or delays courtroom procedure and order.

If a trial court decides to allow juror questions, notice should be given to counsel. If counsel objects, proceeding with juror questions should be supported by findings on the record.

Recommended Procedures if Questions are Allowed

There appears to be consensus on the basic procedures to be followed if juror questions are allowed. The major aspects are as follows:

a. Whether to allow questions lies within the judge's discretion.
b. Jurors should be given preliminary instructions advising them of the right to submit questions and explaining the procedure to be used.
c. After a witness is interrogated by counsel, but before the witness leaves the stand, the jurors are asked if they have any questions.
d. Questions are submitted in writing to the judge and are shown to the lawyers, who may object without the jury knowing of it.
e. The judge reviews the questions and any objections.
f. If the judge sustains the objection, the jury is advised that questions cannot be asked.
g. If the judge overrules the objection, the judge asks the question.

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h. Lawyers are allowed to follow up on issues raised by juror questions.
i. Make a record of the juror questions submitted and asked.

Jury Instructions

If the jury is to be allowed to ask questions, a preliminary instruction telling the jury about the procedure ought to be given. Thus, the content of the instruction is dependent upon the type of procedure that is adopted. Wis JI-Criminal 57 is based on the procedure outlined above.

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58 TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.][1] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

COMMENT

Wis JI-Criminal 58 was originally published in 1992 and republished without substantive change in 2000.

The purpose of this instruction is to correct any misimpressions jurors may have about the immediate availability of written transcripts of the trial testimony.

1. This is not intended to encourage jury requests for the rereading of testimony. However, the jury does have a right to have testimony read. The extent is within the discretion of the trial judge. State v. Cooper, 4 Wis.2d 251, 253-54, 89 N.W.2d 816 (1958).

The judge may choose to summarize the testimony in lieu of having it read. Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893). But the Wisconsin Supreme Court has indicated that it may be "the far better practice" to have the testimony read back. Kohloff v. State, 85 Wis.2d 148, 160, 270 N.W.2d 63 (1978). For other cases applying these standards, see State v. Tarrell, 74 Wis.2d 647, 659, 247 N.W.2d 696 (1976); and Jones v. State, 70 Wis.2d 41, 57-58, 233 N.W.2d 430 (1975).

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59 POLICE REPORTS

During the course of a trial, the attorneys may refer to or use police reports with witnesses. Normally, these police reports will not be provided to you. If you are not provided with a police report, you should use your collective memory regarding any reference to police reports.

COMMENT

Wis JI-Criminal 59 was approved by the Committee in March 2001.

Because references are made to police reports in so many cases, this instruction has also been incorporated into Wis JI-Criminal 50, **PRELIMINARY INSTRUCTION . . .**

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60 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A WITNESS

No matter what language people speak, they ha ve the right to have their testimony heard and understood. You are about to hear a trial in which an interpreter will translate for one or more of the witnesses. The interpreter is required to remain neutral. The interpreter is required to translate between English and [insert appropriate other language] accurately and impartially to the best of the interpreter's skill and judgment.

The evidence you are to consider is only that provided through the official court interpreter. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation. You must disregard any different meaning of the non-English words.

You must evaluate interpreted testimony as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

ADD THE FOLLOWING IF APPROPRIATE:

[Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's translated testimony based on your conclusions, if any, regarding the extent to which that person speaks English.]

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COMMENT

Wis JI-Criminal 60 was originally published in 1994 and revised in 1999. This revision was approved by the Committee in August 2002.

This instruction is intended for use when an interpreter is necessary for translating the testimony of a witness. Interpreters are also used in other situations: where a juror requires an interpreter (see Wis JI-Criminal 61); and, when the defendant requires the assistance of an interpreter (see Wis JI-Criminal 62). See State v. Santiago, 206 Wis.2d 3, 556 N.W.2d 687 (1996), which discusses the different functions of an interpreter.

A Code of Ethics for Court Interpreters was adopted as Chapter SCR 63, effective July 1, 2002.

This instruction is adapted from an instruction from the state of Oregon which is copyrighted by the Oregon State Bar and is reprinted with permission. See Oregon Criminal Jury Instruction Number 1001A, Uniform Criminal Jury Instructions (Oregon CLE 1994). The Oregon instruction is discussed in Vol 8, No. 15 BNA Criminal Practice Manual 331-32 (July 20, 1994).

The Committee concluded that an instruction like this may be helpful in alleviating some of the doubts a jury may have about evaluating testimony presented through an interpreter.

The second paragraph of the instruction is based on an instruction required by the Delaware Supreme Court. See Diaz v. State, 743 A.2d 1166 (Del. Supr. 1999).

The Committee also recommends asking jurors during voir dire whether any of them speak or understand the language involved in the interpretation.

Section 906.04, Wisconsin Rules of Evidence, provides: "An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation."

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61 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR A JUROR

One of the jurors requires help from an interpreter. The role of the interpreter is to provide communications assistance, so that the juror can hear the evidence and participate effectively in jury deliberations. An interpreter must interpret truly, accurately, completely, and impartially, in accordance with the standards prescribed by law and the code of ethics for court interpreters. An interpreter may not offer any opinion on the proceedings, or ask any questions, or participate in the jury's deliberations. An interpreter may not disclose or comment upon anything that happens in jury deliberations unless ordered to do so by the court. During the deliberations, address the juror directly and speak as freely as if an interpreter was not there. Please do not engage the interpreter in conversation, except to speak with the juror.

COMMENT

Wis JI-Criminal 61 was originally published in 2003. This revision updated the Comment and was approved by the Committee in June 2003.

This instruction was based on suggestions of the Wisconsin Supreme Court's Court Interpreter Committee for cases involving hearing impaired jurors. Persons who are not "able to read and understand the English language" are not qualified for jury service; the clerk shall strike their names from the list of prospective jurors. §§ 756.02 and 756.04(9). State v. Carlson, 2003 WI 40, ¶2, 261 Wis.2d 97, 661 N.W.2d 51.

A Code Of Ethics For Court Interpreters was adopted as Chapter SCR 63, effective July 1, 2002.

Two other instructions address the use of an interpreter: Wis JI-Criminal 60 is intended for cases where a witness uses an interpreter; Wis JI-Criminal 62 is intended for cases where the defendant uses an interpreter. See State v. Santiago, 206 Wis.2d 3, 556 N.W.2d 687, which discusses the different functions of an interpreter.

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62 PRELIMINARY INSTRUCTION: USE OF AN INTERPRETER FOR THE DEFENDANT

TO BE GIVEN ONLY UPON THE DEFENDANT'S REQUEST

The defendant requires help from an interpreter. The role of the interpreter is to provide communications assistance, so that the defendant can hear the evidence, understand the proceedings, and communicate with defense counsel.

ADD THE FOLLOWING IF APPROPRIATE:

[Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you must not give greater or lesser weight to a person's translated statements based on your conclusions, if any, regarding the extent to which that person speaks English.]

COMMENT

Wis JI-Criminal 62 was approved by the Committee in August 2002.

This instruction was based on suggestions of the Wisconsin Supreme Court's Court Interpreter Committee. A Code Of Ethics For Court Interpreters was adopted as Chapter SCR 63, effective July 1, 2002.

Two other instructions address the use of an interpreter: Wis JI-Criminal 60 is intended for cases where a witness uses an interpreter; Wis JI-Criminal 61 is intended for cases where a juror uses an interpreter. See State v. Santiago, 206 Wis.2d 3, 556 N.W.2d 687, which discusses the different functions of an interpreter.

The Committee concluded that this instruction should be given only if requested by the defendant, because the defendant may prefer not to call attention to the need to use an interpreter.

In cases where the defendant uses a court-appointed interpreter it may be appropriate for the court to assure that the defendant has been made aware of the following admonitions, also suggested by the Court Interpreter Committee:

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An interpreter is prohibited from becoming personally involved in this case in any manner. The interpreter may not offer any information or advice to you. If you have any questions during this trial, you should ask your attorney or this court. The interpreter is permitted to interpret such questions but not to answer them. Please do not try to engage the interpreter in any conversation, about this case or about anything at all. If you cannot understand the interpreter, please tell the court.

Because this information is not directed primarily to the jury, the Committee concluded that it need not be published as an instruction. It is included here as a potential resource for the courts.

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70 PRELIMINARY INSTRUCTION: DEFENDANT PROCEEDING PRO SE

[TO BE GIVEN IF THE DEFENDANT HAS EXPRESSLY WAIVED COUNSEL AND HAS CHOSEN TO PROCEED PRO SE.]

The defendant has a constitutional right to represent (himself) (herself). I have advised the defendant that the same rules apply whether a lawyer acts for (him) (her) or (he) (she) acts for (himself) (herself). The defendant has decided to represent (himself) (herself) and this decision must not influence your verdict in any manner.

ADD THE FOLLOWING IF STANDBY COUNSEL HAS BEEN APPOINTED:

[I have appointed (name of lawyer) to be available to give legal advice to the defendant if the defendant requests it.][1]

COMMENT

Wis JI-Criminal 70 was originally published in 1998. This revision was approved by the Committee in June 2000.

This instruction is for the case involving a defendant who has expressly waived counsel and has chosen to proceed pro se. It is recommended for use after voir dire is completed and before presentation of the case begins. The Committee concluded that in a case involving a pro se defendant, a jury may wonder why the defendant has no lawyer and that it is best to tell the jury something rather than ignore the issue and possibly encourage speculation. The instruction is adapted in part from No. 1.06, Federal Criminal Jury Instructions, by Potuto, Saltzburg, and Perlman.

This instruction is **not** recommended for use in a case where the defendant has been found to have forfeited the right to counsel. Express waiver and forfeiture of counsel are discussed in detail in **SM-30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL**.

1. The role of standby counsel is discussed in SM-30, supra, at section IV.

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100 OPENING INSTRUCTIONS

Members of the jury:

The court will now instruct you upon the principles of law which you are to follow in considering the evidence and in reaching your verdict.

It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.

If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

COMMENT

Wis JI-Criminal 100 was originally published in 1962, revised in 1983 and republished without change in 1991. This revision was approved by the Committee in May 1999.

This instruction may be given either before the taking of evidence, at the close of the evidence, or at both times.

The second paragraph of the instruction was adapted from a revision of a standard California instruction discussed in Charrow and Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia L. Rev. 1306, 1342 (1979).

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101 OPENING STATEMENTS

The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

COMMENT

Wis JI-Criminal 101 was originally published in 1999. This revision was approved by the Committee in February 2001.

The 2001 revision modified the second sentence to substitute the phrase "give the lawyers an opportunity to tell you what they expect the evidence will show" for "outline for you what each side expects to prove." The revision is believed to be a more accurate statement.

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103 EVIDENCE DEFINED

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.

Second, the exhibits the court has received, whether or not an exhibit goes to the jury room.[1]

Third, any facts to which the lawyers have agreed or stipulated[2] or which the court has directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial.

COMMENT

Wis JI-Criminal 103 was originally published in 1983 and republished without change in 1991. This revision was approved by the Committee in December 1999.

The instruction is modeled after an instruction suggested in "Communicating With Juries: Problems And Remedies," by Judge William W. Schwarzer, 69 Calif. L. Rev. 731 (1981).

The 1999 revision added the following to the sentence relating to exhibits: "whether or not an exhibit goes to the jury room." Wis JI-Criminal 155, EXHIBITS, continues to be published as an optional instruction for use where more detailed advice about the status of exhibits is believed to be helpful.

1. Permitting exhibits to be taken to the jury room is a decision resting within the discretion of the trial court. For a discussion of factors bearing on this discretionary decision, see Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929).

2. Also see Wis JI-Criminal 162, AGREED FACTS. If the agreed facts go to an element of the crime, a personal waiver by the defendant is required. See State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), discussed in Wis JI-Criminal 162, footnote 1 and SM-21, Waiver of Jury Trial, at section III. C. Partial Jury Trial Waiver.

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110 ONE DEFENDANT: SINGLE COUNT: NO INCLUDED OFFENSE

The (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE INFORMATION OR COMPLAINT.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

COMMENT

Wis JI-Criminal 110 was originally published in 1962 and revised in 1979 and 1990. It was republished without substantive change in 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 480 for a corresponding instruction on verdicts submitted.

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112 ONE DEFENDANT: SINGLE COUNT: LESSER INCLUDED OFFENSES

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED, OMITTING THE LAST PARAGRAPH.]

If you are not so satisfied, you must not find the defendant guilty of (charged crime),[1] and you should consider whether the defendant is guilty of (lesser included crime)[2] in violation of Section _____ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

Make Every Reasonable Effort to Agree

You should make every reasonable effort[3] to agree unanimously on your verdict on the charge of (charged crime) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of (charged crime), you should consider whether the defendant is guilty of (lesser included crime).

[READ INSTRUCTION ON THE LESSER INCLUDED OFFENSE,[4] OMITTING THE WORDS: "AS CHARGED IN THE (INFORMATION) (COMPLAINT)" IF THEY APPEAR.]

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You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed (charged crime), the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense(s) I have submitted to you.

If you are not satisfied beyond a reasonable doubt that the defendant committed (either one) (any) of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 112 was originally published in 1962 and revised in 1979, 1985, 1990, 1991, and 1996. It was republished without substantive change in 2000.

The 1996 revision changed the text preceding note 1 to conform it to the approach used in instructions with built-in lesser included offenses. See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022. The revised language is more consistent with the basic premise of the instruction that unanimous agreement on "not guilty" in the charged crime is not necessary before proceeding to consider the lesser included crime. See note 3, below.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

For an alternative way of handling lesser included offenses, see Wis JI-Criminal 112A. Instead of repeating the full instruction in the lesser included offenses, Wis JI-Criminal 112A focuses on the fact which distinguishes the greater offense from the lesser.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

Wis JI-Criminal 112 is intended to provide a "bridge" or "transition" between the charged crime and a lesser included offense. Some suggested uniform instructions that deal with two or more related offenses

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have the "transition" built in, making separate use of Wis JI-Criminal 112 unnecessary. (See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022 dealing with homicide charges and Wis JI-Criminal 6035 and 6036 dealing with controlled substance charges.)

This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In such cases, the reference to "information" should be changed to "complaint."

1. Here state the short title of the offense charged. Ordinarily, the Criminal Code titles may be used, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

2. Here state the short title of the lesser included offense.

An instruction on a lesser included offense should be given only if the lesser offense is an included offense under § 939.66 and if the evidence reasonably supports acquittal on the greater offense and conviction on the lesser. See SM-6 for a discussion of the evidentiary rules and of problems that may arise in deciding whether to submit lesser included offenses.

3. This paragraph attempts to provide a bridge between the charged crime and the lesser included offense. An unpublished opinion of the Wisconsin Court of Appeals — Pharr v. State, June 18, 1979 — commended this problem to the attention of the Committee.

The court in Pharr reviewed the prior published version of Wis JI-Criminal 112 and found that it had "inherent infirmities": neither the phrase, "If you find the defendant not guilty," nor, "If, however, you are not so satisfied, . . ." advises the jury how it is to arrive at the conclusion that it is not satisfied of guilt. The following was suggested as an improvement:

> We think a pattern jury instruction would better inform the jury of its options without any coercive effect, if it apprised the jury that when deadlocked upon a less than unanimous vote on the guilt of the defendant with respect to the charge in the information or complaint, it may proceed to consider the next lesser included offense. "Deadlocked" could be defined as the jury's conclusion, after full and complete consideration of the evidence, that unanimous agreement is impossible, and that further deliberation on the charged offense would be fruitless. Similar instructions could be formulated to prescribe the same approach to multiple counts and subsequent lesser included offenses.

The basis for the court's decision was the assumption that it would be error for the instruction to require the jury to be unanimous in finding the defendant not guilty of the charged crime before considering the lesser offense. This conclusion was found to be implicit in earlier Wisconsin Supreme Court decisions, Payne v. State, 199 Wis. 615, 227 N.W. 258 (1929), and Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). For a discussion of the advantages and disadvantages of requiring unanimity, see United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978). For the view that requiring unanimity on the offense charged is

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error, see State v. Ogden, 35 Or. App. 91, 580 P.2d 1049 (1978), and People v. Johnson, 83 Mich. App. 1, 268 N.W.2d 259 (1978).

At the other extreme from requiring unanimity is to allow the jury to consider any of the submitted offenses without regard to sequence. The Pharr decision rejected this theory. Other cases also support the usual practice of asking the jury to first consider the charged crime before moving on to consider lesser included offenses. State v. McNeal, 95 Wis.2d 63, 288 N.W.2d 874 (Ct. App. 1980): Pharr v. Israel, 629 F.2d 1278 (7th Cir. 1980).

The Committee concluded that Wis JI-Criminal 112 treats the problem correctly: the jury is told to make every reasonable effort to reach unanimous agreement on the charged crime before moving on to the lesser included crime.

4. If more than one lesser included offense is submitted, the substance of Wis JI-Criminal 112 should be repeated for each offense.

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112A LESSER INCLUDED OFFENSE: ALTERNATIVE STYLE

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE CRIME CHARGED, OMITTING THE LAST PARAGRAPH.]

If you are not so satisfied, you must not find the defendant guilty of (crime charged), and you should consider whether the defendant is guilty of (lesser included crime) in violation of Section _____ of the Criminal Code of Wisconsin, which is a lesser included offense of (crime charged).

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of (crime charged) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of (crime charged), you should consider whether the defendant is guilty of (lesser included crime).

The difference between (crime charged) and (lesser included crime) is that (crime charged) requires one additional element: (here identify the fact which distinguishes the crime charged from the lesser included crime).

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If you are satisfied beyond a reasonable doubt that all the elements of (crime charged) were present, except the element requiring that _____, you should find the defendant guilty of (lesser included crime).

In other words, if you are satisfied beyond a reasonable doubt that the defendant (here summarize elements of the lesser included crime), you should find the defendant guilty of (lesser included crime).

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed (crime charged), the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 112A was originally published in 1985 and revised in 1990 and 1996. It was republished without substantive change in 2000.

The 1996 revision changed the third paragraph of the instruction to conform it to the approach used in instructions with built-in lesser included offenses. See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022. The revised language is more consistent with the basic premise of the instruction that unanimous agreement on "not guilty" in the charged crime is not necessary before proceeding to consider the lesser included crime. See note 3, Wis JI-Criminal 112.

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The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

This instruction provides an alternative way of presenting a lesser included offense to the jury. The uniform instruction, Wis JI-Criminal 112, requires reading the instruction for the charged crime and also the instruction for the lesser included offense. This will usually result in substantial repetition without clearly identifying the difference between the two offenses.

Wis JI-Criminal 112A highlights the difference between the greater and lesser offenses rather than rereading the full instruction for the lesser included crime. It is especially suitable for those cases where a single element distinguishes the greater from the lesser offense, such as armed robbery and unarmed robbery. Wis JI-Criminal 112A EXAMPLE illustrates how Wis JI-Criminal 112A would be used for such a case.

Wis JI-Criminal 112A is not suitable for cases where the difference between the greater and lesser offenses is not clearly specified by a single element.

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112A EXAMPLE ARMED ROBBERY: ROBBERY (UNARMED)

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON ARMED ROBBERY, OMITTING THE LAST PARAGRAPH.]

If you are not so satisfied, you must not find the defendant guilty of armed robbery, and you should consider whether the defendant is guilty of unarmed robbery in violation of § 943.32(1) of the Criminal Code of Wisconsin, which is a lesser included offense of armed robbery.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of armed robbery before considering the offense of unarmed robbery. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of armed robbery, you should consider whether the defendant is guilty of unarmed robbery.

The difference between armed robbery and unarmed robbery is that armed robbery requires one additional element: that the defendant used or threatened to use a dangerous weapon.

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If you are satisfied beyond a reasonable doubt that all the elements of armed robbery were present, except the element requiring that the defendant used or threatened to use a dangerous weapon, you should find the defendant guilty of unarmed robbery.

In other words, if you are satisfied beyond a reasonable doubt that the defendant took property from the person of _____, that the defendant took the property with the intent to steal, and that the defendant used force against _____ with intent to overcome _____'s physical resistance to the taking or carrying away of the property, you should find the defendant guilty of unarmed robbery.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant committed armed robbery, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 112A EXAMPLE was originally published in 1985 and revised in 1990, 1991, and 1997. It was republished without substantive change in 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

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115 ONE DEFENDANT: TWO COUNTS

The first count of the (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT OF THE INFORMATION OR COMPLAINT.]

To this charge, the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE FIRST COUNT.]

The second count of the (information) (complaint) charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

To this charge, the defendant has also entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE SECOND COUNT.]

COMMENT

Wis JI-Criminal 115 was originally published in 1962 and revised in 1979, 1990, and 1991. It was republished without substantive change in 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where more than two counts are charged, or where an offense charged includes a lesser offense, this instruction will need to be altered accordingly. If there are two or more counts charging like offenses, the instruction should be altered so that those counts are read in succession and only one instruction given on the elements of that particular offense. See Wis JI-Criminal 115 EXAMPLE.

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Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 484 for corresponding instruction on verdicts submitted.

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115 EXAMPLE MULTIPLE CHARGES OF FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: THREE VICTIMS

INSTRUCTION RENUMBERED —

SEE WIS JI-CRIMINAL 116 EXAMPLE

COMMENT

Wis JI-Criminal 115 EXAMPLE was originally published in 1987 and revised in 1990 and 2000. It was revised and renumbered as Wis JI-Criminal 116 EXAMPLE in 2004.

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116 MULTIPLE CHARGES OF THE SAME OFFENSE: DIFFERENT VICTIMS

The defendant is charged with three separate counts of (name of offense).

The first count of the information in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT.]

The second count of the information in this case charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

The third count of the information in this case charges that:

[READ THE CHARGE IN THE THIRD COUNT.]

CONTINUE WITH ADDITIONAL COUNTS AS NECESSARY

The defendant has entered a plea of not guilty to each of these charges which means the State must prove every element of each offense charged beyond a reasonable doubt.

Statutory Definition of the Crime

(Name of offense), as defined in § _____ of the Criminal Code of Wisconsin is committed by one who (refer to the uniform instruction for the summary definition of the offense).

State's Burden of Proof

Before you may find the defendant guilty of any count of _____, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following ___elements were present with respect to that count.

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Elements of the Crime That the State Must Prove

SET FORTH THE ELEMENTS AS PROVIDED IN THE UNIFORM INSTRUCTIONS, INCLUDING DEFINITIONS. THE WORDING OF SOME ELEMENTS MAY NEED TO BE CHANGED TO FIT THIS FORMAT. IF THE INSTRUCTION CALLS FOR A NAME TO BE USED, IT WILL USUALLY BE SUFFICIENT TO REFER TO "THE PERSON NAMED IN THAT COUNT."[1]

1. As to each count, _____.

2. As to each count, _____.

3. As to each count, _____.

4. As to each count, _____.

CONTINUE WITH ADDITIONAL ELEMENTS OR COUNTS AS NECESSARY

Jury's Decision

THE COMMITTEE RECOMMENDS SEPARATE CLOSING PARAGRAPHS FOR EACH COUNT[2]

If you are satisfied beyond a reasonable doubt that all __ elements of (name of offense) have been proved as to Count One, you should find the defendant guilty of (name of offense) as charged in Count One.

If you are not so satisfied, you must find the defendant not guilty as to Count One.

If you are satisfied beyond a reasonable doubt that all __ elements of (name of offense) have been proved as to Count Two, you should find the defendant guilty of (name of offense) as charged in Count Two.

If you are not so satisfied, you must find the defendant not guilty as to Count Two.

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If you are satisfied beyond a reasonable doubt that all __ elements of (name of offense) have been proved as to Count Three, you should find the defendant guilty of (name of offense) as charged in Count Three.

If you are not so satisfied, you must find the defendant not guilty as to Count Three.

CONTINUE WITH ADDITIONAL COUNTS AS NECESSARY

COMMENT

Wis JI-Criminal 116 was approved by the Committee in August 2003.

This instruction is intended to illustrate how Wis JI-Criminal 115 and 484 might be modified for a case involving three charges of the same offense against one defendant. Some changes may also be necessary in the instruction for the underlying offense. It may be helpful to distinguish the counts by referring the name of the victim, the date of the offense, the premises involved, or a similar means of identifying each count. Wis JI-Criminal 116 EXAMPLE shows how the instruction might be adapted for a case involving multiple charges of sexual assault of a child.

The instruction was developed because it had come to the Committee's attention that there had been problems in developing clear and accurate instructions for the multiple count case. Repeating complete instructions for each count is not desirable or necessary. While no single approach is absolutely required or clearly preferable, certain constructions, such as using "either-or," "and-or," "either or both," etc., should, in the Committee's judgment, be avoided. This instruction is offered as an illustration of one way to approach the multiple count case. The objective is to avoid unnecessary repetition while clearly setting forth the facts necessary to constitute each crime charged.

1. For example, applying the model to burglary would yield the following:

1. As to each count, the defendant intentionally entered the building named in that count.
2. As to each count, the defendant entered the building without the consent of the person in lawful possession.
3. As to each count, the defendant knew that the entry was without consent.
4. As to each count, the defendant entered the building with intent to steal.

2. The Committee recommends that separate closing paragraphs be used for each count, as indicated in the instruction. This will assure that the jury focuses on the elements for each charge.

As an alternative, it may be possible to provide a single closing paragraph to cover all counts. Something like the following would be required:

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If you are satisfied beyond a reasonable doubt that all ____ elements of (name of offense) have been proved as to any count, you should find the defendant guilty of (name of offense) as charged in that count.

If you are not so satisfied as to any count, you must find the defendant not guilty as to that count.

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116 EXAMPLE MULTIPLE CHARGES OF FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: THREE VICTIMS

The defendant is charged with three separate counts of first degree sexual assault of a child.

The first count of the information in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT.]

The second count of the information in this case charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

The third count of the information in this case charges that:

[READ THE CHARGE IN THE THIRD COUNT.]

The defendant has entered a plea of not guilty to each of these charges which means the State must prove every element of each offense charged beyond a reasonable doubt.

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a person who has not attained the age of 13 years.

State's Burden of Proof

Before you may find the defendant guilty of any count of first degree sexual assault of a child, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present with respect to that count.

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Elements of the Crime That the State Must Prove

1. As to each count, the defendant had sexual contact with the person named in that count.

2. As to each count, the person named in that count had not attained the age of 13 years.

Meaning of Sexual Contact

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

[THE COMMITTEE RECOMMENDS SEPARATE CLOSING PARAGRAPHS FOR EACH COUNT.][1]

If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault of a child have been proved as to Count One, you should find the defendant guilty of first degree sexual assault of a child as charged in Count One.

If you are not so satisfied, you must find the defendant not guilty as to Count One.

If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault of a child have been proved as to Count Two, you should find the defendant guilty of first degree sexual assault of a child as charged in Count Two.

If you are not so satisfied, you must find the defendant not guilty as to Count Two.

If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault of a child have been proved as to Count Three, you should find the defendant guilty of first degree sexual assault of a child as charged in Count Three.

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If you are not so satisfied, you must find the defendant not guilty as to Count Three.

COMMENT

This instruction was originally published as Wis JI-Criminal 115 EXAMPLE in 1987 and revised in 1990 and 2000. This revision renumbered it Wis JI-Criminal 116 EXAMPLE and was approved by the Committee in August 2003.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

This instruction is intended to illustrate how Wis JI-Criminal 116 might be modified for a case involving three charges of the same offense against one defendant. It also illustrates the changes that are necessary in the instruction for the underlying offense (in this example, Wis JI-Criminal 2102, **FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS — § 948.02(1)).**

It had come to the Committee's attention that there had been problems in developing clear and accurate instructions for the multiple count case. While no single approach is absolutely required or clearly preferable, certain constructions, such as using "either-or," "and-or," "either or both," etc., should, in the Committee's judgment, be avoided. Wis JI-Criminal 116 EXAMPLE is, therefore, offered as an illustration of one way to modify and combine the standard instructions for a multiple count case. The objective is to avoid unnecessary repetition while clearly setting forth the facts necessary to constitute each crime charged.

1. The Committee recommends that separate closing paragraphs be used for each count, as indicated in the instruction. This will assure that the jury is accurately informed of the facts necessary to constitute guilt for each charge.

As an alternative, it may be possible to provide a single closing paragraph to cover all counts. Something like the following would be required:

> If you are satisfied beyond a reasonable doubt that both elements of first degree sexual assault have been proved as to any count, you should find the defendant guilty of first degree sexual assault of a child as to that count.
>
> If you are not so satisfied as to any count, you must find the defendant not guilty as to that count.

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117 ONE DEFENDANT: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 117 was originally published in 1964 and revised in 1979. It was withdrawn in 1990. This was republished without change in 2000.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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120 TWO DEFENDANTS: SINGLE COUNT: NO INCLUDED OFFENSE

The (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE INFORMATION OR COMPLAINT.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

It is for you to determine, as to each defendant, whether that defendant is guilty or not guilty of the offense charged. You must make a finding as to each defendant separately, and, at the close of these instructions, the court will submit to you separate verdicts regarding each defendant.

[READ INSTRUCTION ON THE OFFENSE CHARGED.]

COMMENT

Wis JI-Criminal 120 was originally published in 1966 and revised in 1979 and 1990. This revision was approved by the Committee in January 2000.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 490 for corresponding instruction on verdicts submitted.

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122 TWO DEFENDANTS: SINGLE COUNT: INCLUDED OFFENSE

The information in this case charges that:

[READ THE CHARGE IN THE INFORMATION.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION FOR THE CHARGED CRIME, OMITTING LAST TWO PARAGRAPHS.]

If you are satisfied beyond a reasonable doubt that the defendant (first defendant) did (list the elements of the charged crime), you should find the defendant (first defendant) guilty of (charged crime) as charged in the information.

If you are not so satisfied, you must not find the defendant (first defendant) guilty of (charged crime),[1] and you should consider whether (first defendant) is guilty of (lesser included crime),[2] in violation of § ____ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

If you are satisfied beyond a reasonable doubt that the defendant (second defendant) did (list the elements of the charged crime), you should find the defendant (second defendant) guilty of (charged crime) as charged in the information.

If you are not so satisfied, you must not find the defendant (second defendant) guilty of (charged crime),[3] and you should consider whether (second defendant) is guilty of

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(lesser included crime),[4] in violation of § ___ of the Criminal Code of Wisconsin, which is a lesser included offense of (charged crime).

Make Every Reasonable Effort to Agree

With respect to each defendant, you should make every reasonable effort[5] to agree unanimously on your verdict on the charge of (charged crime) before considering the offense of (lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge against one defendant of (charged crime), you should consider whether that defendant is guilty of (lesser included crime).

[READ INSTRUCTION FOR LESSER INCLUDED CRIME, OMITTING LAST TWO PARAGRAPHS.]

If you are satisfied beyond a reasonable doubt that the defendant (first defendant) did (list the elements of lesser included crime), you should find the defendant (first defendant) guilty of (lesser included crime).

If you are not so satisfied, you must find the defendant (first defendant) not guilty.

If you are satisfied beyond a reasonable doubt that the defendant (second defendant) did (list the elements of the lesser included crime), you should find the defendant (second defendant) guilty of (lesser included crime).

If you are not so satisfied, you must find the defendant (second defendant) not guilty.

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It is for you to determine, as to each defendant, whether that defendant is guilty or not guilty of an offense. You must make a finding as to each defendant separately, and, at the close of these instructions, the court will submit to you separate verdicts regarding each defendant.

You are not, in any event, to find a defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that a defendant committed (charged crime), the offense charged in the information, you should find that defendant guilty of that offense, and you must not find that defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt that a defendant committed either one of the offenses I have submitted to you, as to that defendant you must make a finding of not guilty.

COMMENT

Wis JI-Criminal 122 was originally published in 1962 and revised in 1979, 1990, and 1996. This revision was approved by the Committee in January 2000.

The 1996 revision changed the text preceding notes 1 and 3 to conform it to the approach used in instructions with built-in lesser included offenses. See, for example, Wis JI-Criminal 1012, 1014, 1018, and 1022. The revised language is more consistent with the basic premise of the instruction that unanimous agreement on "not guilty" in the charged crime is not necessary before proceeding to consider the lesser included crime. See note 3, Wis JI-Criminal 112.

The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version

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could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 492 for corresponding instruction on verdicts submitted.

This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In such cases, the reference to "information" should be changed to "complaint."

1. Here state the short title of the offense charged. Ordinarily, the Criminal Code titles may be used, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

2. Here state the short title of the lesser included offense.

3. Note 1, supra.

4. Note 2, supra.

5. See note 3, Wis JI-Criminal 112.

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125 TWO DEFENDANTS: TWO COUNTS

The first count of the (information) (complaint) in this case charges that:

[READ THE CHARGE IN THE FIRST COUNT OF THE INFORMATION OR COMPLAINT.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE FIRST COUNT.]

The second count of the (information) (complaint) charges that:

[READ THE CHARGE IN THE SECOND COUNT.]

To this charge, each of the defendants has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.

[READ INSTRUCTION ON THE OFFENSE CHARGED IN THE SECOND COUNT.]

It is for you to determine, as to each defendant, whether that defendant is guilty or not guilty of the offenses charged in the (information) (complaint). You must make a finding as to each defendant separately, and, at the close of these instructions, the court will submit to you separate verdicts regarding each defendant.

COMMENT

Wis JI-Criminal 125 was originally published in 1962 and revised in 1979, 1990, and 1991. This revision was approved by the Committee in January 2000.

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The 1990 change substituted "which means the state must prove every element of the offense charged beyond a reasonable doubt" for "which means a denial of every material allegation in the (information) (complaint)." No change in substance is intended. The Committee concluded that the previous version could be misleading in cases where the defense is directed at a specific element rather than being a general denial of every material allegation.

Where there are more than two counts, or where an offense charged includes a lesser offense, this instruction will need to be altered accordingly. If there are two or more counts charging like offenses, the instruction should be altered so that those counts are read in succession and only one instruction given on the elements of that particular offense.

Where the defendant has entered a special plea of not guilty by reason of mental disease or defect, the court should so instruct by using the appropriate instructions from the series beginning at Wis JI-Criminal 600.

See Wis JI-Criminal 494 for corresponding instruction on verdict submitted.

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127 TWO DEFENDANTS: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 127 was originally published in 1962 and revised in 1979. It was withdrawn in 1990. This was republished without change in 2000.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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128 CHARGES DISPOSED OF DURING TRIAL

At the beginning of the trial, I described the charges against the defendant. Count specify number, charging identify crime, has been disposed of[1] and is no longer part of this case. Count specify number, charging identify crime, remains. Do not guess about or concern yourselves with the reasons for this disposition. It must not affect your consideration of the charges that remain.

[Do not consider evidence that related only to the count that has been disposed of.][2]

COMMENT

Wis JI-Criminal 128 was approved by the Committee in February 2014.

This instruction is intended to be used when charges are disposed of during trial. The jury would have been informed of all charges at the beginning of the trial and should be advised not to concern themselves with why those charges are no longer in the case.

1. The term "disposed of" is used because it is general enough to apply to two common situations: where a count is dismissed during trial and where a guilty plea is entered to a count after trial has begun.

2. The sentence in brackets should be given when the judge decides that it would be helpful to the jury after considering the specific facts in the case. Sometimes evidence may be easily distinguished as pertaining only to the disposed-of counts, as where the events leading to the charge occurred on a different date than the remaining counts. Other times, the evidence may relate to a single occurrence that supported the multiple charges and separating the evidence may not be possible. If there has been a motion to strike certain evidence – because it related only to a disposed-of count – the jury should be instructed to disregard the stricken evidence. Where the evidence relating to the disposed-of count is unfairly prejudicial to the defendant, the court may need to evaluate the need for a mistrial.

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140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

Presumption of Innocence

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.[1]

State's Burden of Proof

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

Reasonable Hypothesis

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence,[2] you should do so and return a verdict of not guilty.

Meaning of Reasonable Doubt

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given,[3] arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.[4]

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A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.[5]

COMMENT

Wis JI-Criminal 140 and comment were originally published in 1962 and revised in 1983, 1986, 1987, 1991, 1994, and 2016. The instruction was republished without substantive change in 2000. This revision was approved by the Committee in June 2019; it expanded footnote 5.

This instruction must be provided to the jury in writing. Section 972.10(5) was amended by order of the Wisconsin Supreme Court dated April 30, 1986, to require that the instruction "providing the burden of proof" be included among those provided to the jury in writing. Compare E. B. v. State, 111 Wis.2d 175, 330 N.W.2d 584 (1983), where the Wisconsin Supreme Court held that Wis JI-Criminal 140 was not one of the "substantive" instructions that were to be provided to the jury in writing under the former version of § 972.10(5).

For early discussions of definitions of "beyond a reasonable doubt," see Anderson v. State, 41 Wis. 430 (1877); Emery v. State, 92 Wis. 146, 65 N.W. 848 (1896); Emery v. State, 101 Wis. 627, 650-56, 78 N.W. 145, 152 (1899). Also see Hoffman v. State, 97 Wis. 571, 576, 73 N.W. 51 (1897), where, in reference to the instruction on "reasonable doubt," the court stated: "It needs be a skillful definer who shall make the meaning of the term more clear by the multiplication of words."

The proper definition of "beyond a reasonable doubt" continues to receive attention from appellate courts and persons concerned with the understandability of jury instructions. So-called plain language versions are suggested by the Federal Judicial Center Committee to Study Criminal Jury Instructions in Pattern Criminal Jury Instructions (1982) (available in pamphlet from West Publishing Company) and in Sales, Elwork, and Alfini, Making Jury Instructions Understandable (Michie, 1982). Some appellate courts have concluded that "beyond a reasonable doubt" cannot be helpfully defined and that there should be no instruction attempting to define it. For example, the United States Court of Appeals for the Seventh Circuit has concluded that the phrase is "self explanatory and is its own best definition." Federal Criminal Jury Instructions of the Seventh Circuit 2.07, p. 18 (1980). Also see United States v. Kramer, 711 F.2d 789, 794-95 (7th Cir. 1983).

The Committee has carefully reviewed Wis JI-Criminal 140 several times in light of the above. Only minor changes have been made in the text as it was originally drafted in 1962. As the notes below indicate, several parts of the instruction have been approved by the Wisconsin appellate courts. Several cases have held it is error not to give certain parts of the instruction upon request. Rather than risk creating appellate

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issues by significantly changing the instruction, the Committee decided it was better to retain the original version.

The Committee reviewed Wis JI-Criminal 140 in 1994 in light of a decision of the United States Supreme Court that analyzed definitions of "beyond a reasonable doubt." See Victor v. Nebraska, 511 U.S. 1 (1994). A second case, Sandoval v. California, was addressed in the same decision. The primary issue before the court was the use of "moral certainty" in the definition of "beyond a reasonable doubt." The instruction in Sandoval read as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on **moral evidence**, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, **to a moral certainty**, of the truth of the charge. [Emphasis added.]

After extensive consideration of what the terms mean today, the court concluded that in the context of all the instructions, the use of "moral evidence" and "moral certainty" was not error.

Wis JI-Criminal 140 has never included the reference to "moral certainty" that is so common in definitions of "beyond a reasonable doubt." The primary case law source for the Wisconsin instruction was Emery v. State, 101 Wis. 627, 78 N.W. 145 (1899). The instruction reviewed there included "moral certainty," but it was not a litigated issue. The early Committee clearly relied on Emery but did not adopt the "moral certainty" language.

One other part of the Sandoval instruction was reviewed – the reference that reasonable doubt "is not a mere possible doubt." The Court rejected the argument, holding the rest of the instruction puts it into proper context. Wis JI-Criminal 140 does not refer to "possible doubt."

The instruction given in Victor was very similar to the one in Sandoval; it included a reference to "moral certainty." But Victor raised two other issues. The Victor instruction defined "reasonable doubt" as "an actual and substantial doubt arising from the evidence." The Court said this was "problematic," since "substantial" could be taken to mean "a large degree," which might be more than the "reasonable" doubt required for acquittal. But the court found that the rest of the instructions put this into proper context by distinguishing it from "mere possibility, from bare imagination, or from fanciful conjecture." Wis JI-Criminal 140 does not refer to "substantial doubt." The Victor instruction also stated: "You may find an accused guilty upon the strong probabilities of the case." The Court found no error: "strong probabilities" was immediately defined as "strong enough to exclude any reasonable doubt."

So, as far as the majority decisions are concerned, there is nothing that requires or even suggests any change in Wis JI-Criminal 140: none of the challenged language appears in Wis JI-Criminal 140; and the Court found no error in the use of such language.

Three justices found fault with a different aspect of the instruction used in Victor:

> 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying acting thereon.

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Wis JI-Criminal 140 has a rough equivalent of this statement, which Justice Ginsberg criticized, citing the conclusion of the committee that drafted the Federal Judicial Center instructions. She also commended the definition of reasonable doubt provided in those instructions. The Committee previously reviewed the Federal Judicial Center instruction and did not believe it was a substantial improvement on Wis JI-Criminal 140. And, Wisconsin case law specifically supports including such a statement. See note 4, below.

1. It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, "until such time, if at all, as it is overcome by credible evidence" is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused. Roen v. State, 182 Wis. 515, 196 N.W. 825 (1924). See also Riley v. State, 187 Wis. 156, 160, 203 N.W. 767 (1925), and Windahl v. State, 189 Wis. 424, 427, 207 N.W. 694 (1926).

2. Lipscomb v. State, 130 Wis. 238, 244, 109 N.W. 986 (1906), held it was error to refuse a requested instruction: "You are instructed that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case acquit the defendant," where the substance of that instruction had not been covered in the general charge.

The Committee has received inquiries about the "reasonable hypothesis of innocence" provision. The Wisconsin Supreme Court clarified its meaning in State v. Poellinger, 153 Wis.2d 493, 503, 451 N.W.2d 752 (1990):

> The rule that the evidence must exclude every reasonable hypothesis of innocence does not mean that if any of the evidence brought forth at trial suggests innocence, the jury cannot find the defendant guilty. The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence. Accordingly, the rule that the evidence must exclude every reasonable hypothesis of innocence refers to the evidence which the jury believes and relies upon to support its verdict.

3. Defining reasonable doubt as one "for which a reason can be given" was first approved in Butler v. The State, 102 Wis. 364, 368-69, 78 N.W. 590, 591-92 (1899). Recent affirmations of this part of the instruction are found in State v. Cooper, 117 Wis.2d 30, 35-36, 344 N.W.2d 194 (Ct. App. 1983), and State v. Bembenek, 111 Wis.2d 617, 641-42, 331 N.W.2d 616 (Ct. App. 1983).

4. The term "the graver transactions of life" was held not to be an equivalent of the approved expression "the most important affairs of life" in McAllister v. State, 112 Wis. 496, 88 N.W. 212 (1901). This case also held that reasonable doubt should be defined as a doubt which should cause a reasonable, prudent person to pause or hesitate in the most important affairs of life rather than as "[a] doubt which would govern and control a prudent man and deter him from acting" in such affairs. 112 Wis. 496, 503, emphasis in original.

5. In 1987, the Committee revised the final sentence of the instruction by deleting the following phrase which had come after the word "truth": ". . . and give the defendant the benefit of a reasonable doubt." The phrase was dropped because it seemed to be redundant and because the instruction seemed to read better without it.

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In 2016, the Committee received several inquiries about the phrase "you are to search for the truth," some based on a recent law review article. Cecchini and White, "Truth Or Doubt? An Empirical Test Of Criminal Jury Instructions," 50 U. Richmond Law Review 1139 (2016). After careful consideration, the Committee decided not to change the text of the instruction. Challenges to including "search for the truth" in the reasonable doubt instruction have been rejected by Wisconsin appellate courts. State v. Avila, 192 Wis.2d 870, 890, 532 N.W.2d 423 (1995) (overruled on other grounds in State v. Gordon, 2003 WI 69, ¶40, 262 Wis.2d 380, 663 N.W.2d 765): "In the context of the entire instruction, we conclude that [JI 140] did not dilute the State's burden of proving guilt beyond a reasonable doubt." Also see, Manna v. State, 179 Wis. 384, 399-340, 192 N.W. 160 (1923). The Wisconsin Supreme Court affirmed the text of the instruction in State v. Trammell, 2019 WI 59, ¶2, --- Wis. ---, --- N.W.2d ----, holding that "Criminal JI 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard."

If an addition to the text is desired, the Committee recommends the following, which is modeled on the 1962 version of Wis JI-Criminal 140:

> You are to search for the truth and give the defendant the benefit of any reasonable doubt that remains after carefully considering all the evidence in the case.

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140A BURDEN OF PROOF: FORFEITURE ACTIONS

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

The burden of establishing every fact necessary to constitute guilt is upon the (State) (City) (County) of _____. Before you can return a verdict of guilty, you must be satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant is guilty.

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that the defendant is guilty because of its greater weight and clear convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

COMMENT

This instruction replaced Wis JI-Criminal 2050 (©1962) in 1993. It was revised in 1998 to update the Comment. It was republished without substantive change in 2000 when it was renumbered from Wis JI-Criminal 140.1 to 140A. This revision was approved by the Committee in October 2010. It added the last two paragraphs, which are adapted from Wis JI-Civil 205.

This instruction is intended for use as part of the general instructions immediately following the instruction on the offense charged. Instructions are published for several forfeiture actions, primarily for traffic offenses. A model for offenses not covered by published instructions is also provided, see Wis JI-Criminal 2680.

The suggested order of instructions for forfeiture actions is as follows:

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Wis JI-Criminal 100 – OPENING INSTRUCTIONS (First paragraph only)
110 – ONE DEFENDANT: SINGLE COUNT: NO INCLUDED OFFENSE
___ – [INSTRUCTION ON OFFENSE CHARGED]
140A – BURDEN OF PROOF: FORFEITURE ACTIONS
190 – WEIGHT OF EVIDENCE
300 – CREDIBILITY OF WITNESSES
460 – CLOSING INSTRUCTION
480 – VERDICTS SUBMITTED FOR ONE DEFENDANT: SINGLE COUNT
515A – FIVE-SIXTHS VERDICT AND SELECTION OF PRESIDING JUROR: FORFEITURE ACTIONS

The "clear, satisfactory, and convincing" standard applies to forfeiture actions involving acts which are also made criminal by state statute. See City of Milwaukee v. Wilson, 96 Wis.2d 11, 21-22, 291 N.W.2d 452 (1980). The same standard applies to all municipal ordinance violations tried in municipal court, see § 800.08(3). Apparently, an ordinance violation with no criminal counterpart, tried in circuit court, may require only the regular civil burden of proof. There appears to be no logical reason for this anomaly.

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141 WHERE IDENTIFICATION OF DEFENDANT IS IN ISSUE

The identification of the defendant is an issue in this case and you should give it your careful attention. You should consider the reliability of any identification made by a witness, whether made in or out of court. You should consider the credibility of a witness making an identification of the defendant in the same way you consider credibility of any other witness.

Identification evidence involves an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification.

Consider the witness' opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation.

You should also consider the period of time which elapsed between the witness' observation and the identification of the defendant and any intervening events which may have affected or influenced the identification.

In evaluating the identification evidence, you are to consider those factors which might affect human perception and memory and all the influences and circumstances relating to the identification. Then give the evidence the weight you believe it should receive.

If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime.

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COMMENT

Wis JI-Criminal 141 was originally published in 1971 and revised in 1980, 1987, 1991, 2000, 2005, 2006, 2008 and 2012. This revision was approved by the Committee in December 2012; it added to and reorganized the Comment.

The Committee has reviewed this instruction often in recent years, as issues relating to eyewitness identification have received increased attention in the appellate courts. The following offers a helpful summary of the current state of knowledge on eyewitness identification and cites many of the leading articles: Richard A. Wise and Martin A. Safer, "A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony," pp. 6-16, Court Review, Spring 2003.

In 2004, the Committee considered a range of alternatives before publishing a revised instruction in 2005 that, in the Committee's judgment, reflects the best approach. Despite the attention being paid to identification issues, the Committee did not discover a new model instruction that it believed was suitable for adoption in Wisconsin. The 2005 revision borrowed a few sentences from Instruction 3.06, Federal Jury Instructions of the Seventh Circuit (West 1980). [Note: That instruction has been substantially modified in the current 7th Circuit instructions. See No. 308, Pattern Criminal Jury Instructions for the Seventh Circuit (1998).]

The 2005 revision attempts to communicate the principle that the same considerations apply to identification witnesses as to other witnesses but that the identification issue deserves careful attention. Thus, some of the material repeats considerations included in the general credibility instruction. See Wis JI-Criminal 300. Minor additions were made to the text of the instruction in the 2006 revision. Subsequent revisions have added to and reorganized the Comment.

Jury instructions are one part of the response to perceived special problems with eyewitness identification testimony. Wisconsin cases addressing these issues are summarized below. The potential importance of a jury instruction on eyewitness identification, in the context of other safeguards, was recognized by the United States Supreme Court in Perry v. New Hampshire, 565 U.S. ___, 132 S.Ct. 716 (2012). The issue was whether rules regarding pretrial screening of allegedly suggestive identification procedures applied where police were not responsible for the suggestiveness. The court concluded they were not, in part because of the availability of other safeguards:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

The Perry decision includes a reference to specific cautionary jury instructions used in a variety of jurisdictions. [See the decision at footnote 7.]

Wisconsin Cases Citing Wis JI-Criminal 141

Wis JI-Criminal 141 [© 1971] was cited with approval in Chapman v. State, 69 Wis.2d 581, 230 N.W.2d 824 (1975), State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), and Hampton v. State, 92 Wis.2d 450, 285 N.W.2d 868 (1979. In all three cases, the Wisconsin Supreme Court upheld the trial court's refusal

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to give a more detailed identification instruction of the type adopted by several circuits of the United States Court of Appeals under their supervisory powers. See, for example, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) and United States v. Hodges, 515 F.2d 650 (7th Cir. 1975).

In Blackwell v. State, 42 Wis.2d 615, 167 N.W.2d 587 (1969), the court recognized that giving an identification instruction "should be encouraged in narcotics—undercover agent cases" because "there is a stronger possibility of misidentification in narcotics cases where an undercover agent may file as many as 100 arrest warrants upon completion of his term of duty." Blackwell, 42 Wis.2d at 625, citing, Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965).

Also see Johnson v. State, 85 Wis.2d 22, 270 N.W.2d 153 (1978), State v. McGee, 52 Wis.2d 736, 190 N.W.2d 893 (1971), and Johns v. State, 14 Wis.2d 119, 109 N.W.2d 490 (1961).

In State v. Amos, 153 Wis.2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989), the court endorsed Wis JI-Criminal 141 as a correct statement of the law in the context of rejecting the defendant's claim that the trial court erred in refusing to give a requested theory of defense instruction (that someone else committed the crime). On theory of defense instructions generally, see Wis JI-Criminal 700.

The Wisconsin Supreme Court reviewed a trial court's refusal to give the more detailed version of Wis JI-Criminal 141 in State v. Waites, 158 Wis.2d 376, 462 N.W.2d 206 (1990). The court held that ". . . the circuit court did not abuse its discretion by giving the limited version of Wis JI-Criminal 141. The limited version, in combination with other instructions and evidence presented to the jury during the trial, sufficiently focused the jury's attention on the issue of identification." 158 Wis.2d 376, 380. However, the court recommended the use of the more detailed instruction in some cases:

> We recognize the dangers inherent in identification testimony when the identity of the criminal is an important issue in a case. In such an instance, we recommend the use of the more detailed instruction to avoid subsequent challenges to the accuracy of such jury instructions. We do not, however, require that the more detailed instruction be given in all situations where the accuracy of the eyewitness identification is an issue. Such a holding would remove some of the circuit court's discretion in giving instructions. Rather, we conclude that the circuit court should determine whether to give the more detailed instruction, basing its decision on factors such as the significance of the identification issue, the nature of other instructions and the danger of misidentification. This determination is not subject to reversal unless the circuit court abuses its discretion.

158 Wis.2d 376, 383-84.

Wisconsin Cases Considering Eyewitness Identification Issues

In State v. Shomberg, 2006 WI 9, 288 Wis.2d 1, 709 N.W.2d 370, the Wisconsin Supreme Court addressed the admissibility of expert testimony on matters relating to identification procedures. The court held that it was not error to exclude expert testimony in a trial to the court held in 2002. But the court noted that "in the intervening years, much has been learned about the processes and limitations of memory," pointing to the court's decision in State v. Dubose, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582, new guidelines for identification procedures promulgated by the Wisconsin Department of Justice, and the recently enacted "Criminal Justice Reform Act," 2005 Wisconsin Act 60. The court also noted:

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> ¶17. Were this case to come before the circuit court today, given the developments that have occurred in the interim, it is highly likely that the judge would have allowed the expert to testify on factors that influence identification and memory.

The court declined to adopt "a presumption of admissibility" of expert testimony in eyewitness identification cases, citing concern that doing so would all but eliminate circuit court discretion. "However, we encourage circuit court judges to carefully consider, in each case, whether the admissibility of the eyewitness expert testimony would be helpful to the trier of fact." 2006 WI 9, ¶43.

In State v. Dubose, the Wisconsin Supreme Court announced new rules regarding "show-up" identification procedures – those where a witness views a single suspect. The court held that identifications resulting from a show-up are not admissible unless the show up was "necessary." "Necessary" means there was no probable cause for arrest or that exigent circumstances prevented conducting a lineup or photo array. Standards were also set for conducting a show-up. The decision does not have a direct impact on the jury instruction.

In State v. Hibl, 2006 WI 52, ¶31, 290 Wis.2d 595, 714 N.W.2d 194, the Wisconsin Supreme Court held that "Dubose does not directly control cases involving identification evidence derived from 'accidental' confrontations resulting in 'spontaneous' identifications. . . . Although most such identifications will be for the jury to assess, the circuit court still has a limited gate-keeping function. It may exclude such evidence under § 904.03 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The court elaborated on the circuit court's obligation:

> In exercising its gate-keeping function, the court should consider whether cross-examination or a jury instruction will fairly protect the defendant from the unreliability of the identification. . . We urge circuit courts, with assistance from the litigants before them, to take into consideration the evolving body of law on eyewitness identification. Any test for reliability and suggestiveness in the eyewitness identification context should accommodate this still-evolving jurisprudence, along with the developing scientific research that forms some of its underpinnings.
> 2006 WI 52, ¶54.

Jury Instructions on Eyewitness Identification

For many years, the most-cited eyewitness identification instruction was the "Telfaire" instruction. It takes its name from the case in which it was offered as a model for use in the District of Columbia, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). The text of the complete Telfaire instruction can be found at 469 F.2d 552 (D.C. Cir. 1972), at 558 (Appendix). The Committee concluded that including a long list of factors like that in the Telfaire model was not an effective approach. The jury should be told how to evaluate those factors in light of the circumstances in the particular case. This, in the Committee's judgment, is more effectively done by advocacy by the lawyers than by a listing of factors by the court.

The Committee specifically rejected language in the Telfaire instruction and in other models that advises the jury that they must find the defendant not guilty if there is a reasonable doubt about the accuracy of the eyewitness identification. The Committee concluded that this statement goes too far: there may be sufficient evidence in addition to the identification that could overcome weakness in the identification and satisfy the "beyond a reasonable doubt" standard.

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The American Bar Association Criminal Justice Section completed an extensive review of eyewitness identification procedures in 2004, including a review of jury instructions. That study concluded that the Telfaire instruction "omits many important factors and can be misleading, for example, by suggesting witness confidence is a good predictor of eyewitness accuracy when the research shows otherwise." American Bar Association Statement Of Best Practices For Promoting The Accuracy Of Eyewitness Identification Procedures Dated August, 2004. [Available on the ABA website: www.abanet.org/leadership/2004/ annual/111c.doc.] The report identified a modified instruction based on Telfaire and the instruction provided in People v. Wright, 43 Cal. 3d 399 (1987), as having been recognized as better approaches.

The Kansas Supreme Court has ordered trial judges to stop using jury instructions that told jurors they could consider how certain the witness was in evaluating an identification. The court concluded that "witness certainty" is a poor indicator of the reliability of an identification. Mitchell v. Kansas, No. 99,163, May 11, 2012.

On July 19, 2012, the New Jersey Supreme Court, by rule, approved new jury instructions on eyewitness identification, use of which will be required after Sept. 4, 2012. There are actually three instructions – one for in-court IDs, one for out-of-court IDs, and one for in- and out-of-court IDs. They are based on State v. Henderson, 208 N.J. 208 (2011), which directed that new instructions be prepared that focus on various factors recognized by research.

Cross-racial Identifications

The Committee considered adding something to the instruction to address cross-racial identifications but decided that a generally applicable statement could not be drafted. The propriety of an instruction on this factor, and any other relating to influences on the identification process, depends on there being an evidentiary basis for the existence of the factor and for the effect it is accorded. The latter may be satisfied by expert testimony or a recognition by appellate courts. Some courts have recognized that special considerations apply to cross-racial identifications. For example, the New Jersey Supreme Court has directed trial courts to address the issue. See, State v. Cromedy, 727 A.2d 457 (N.J. 1999). Other courts have held that a special instruction on cross-racial identification is not required. See, for example, Smith v. State, 857 A.2d 1198 (Md. App. 2004), which includes an extensive discussion of the issue and references to many relevant resources. The Wisconsin Supreme Court has not required a special instruction and has referred to the issue only indirectly: ". . . [I]n this case, the usual dangers inherent in eyewitness identification may have been exacerbated because this was a cross-race identification." State v. McMorris, 213 Wis.2d 156, 170, 570 N.W.2d 384 (1997). A footnote to the quoted material cited articles discussing cross-race identification. 213 Wis.2d 156, 170, at footnote 9. While some model instructions reviewed by the Committee refer to "common knowledge" or to what "studies show" in describing a factor's effect on the identification process, the Committee concluded that those were not sufficient bases on which to base an instruction to the jury on the cross-racial issue or any other specified factor.

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145 INFORMATION NOT EVIDENCE

(An information) (A complaint) is nothing more than a written, formal accusation against a defendant charging the commission of one or more criminal acts. You are not to consider it as evidence against the defendant in any way. It does not raise any inference of guilt.[1]

COMMENT

Wis JI-Criminal 145 was originally published in 1962. Footnote 1 was added in 1976. It was republished without substantive change in 1992 and 2000.

1. Where two or more charges are joined in a single information, there may be a need for a cautionary instruction to cure the possible prejudice to the defendant. Peters v. State, 70 Wis.2d 22, 223 N.W.2d 420 (1975). The instruction is most effective if given at the time the verdict is submitted. Give Wis JI-Criminal 484.

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146 PRECAUTIONARY STATEMENT: ANONYMOUS AND "NUMBERS" JURIES

INCLUDE THE FOLLOWING WHEN THE COURT HAS DETERMINED THAT JURORS WILL NOT BE REFERRED TO BY NAME OR THAT OTHER JUROR INFORMATION MUST BE RESTRICTED

I have decided that for the convenience of court and counsel, we will refer to jurors by numbers. This should not influence your verdict in any manner.

COMMENT

This instruction was approved by the Committee in April 2003.

Whenever a court restricts any juror information, including referring to a juror by number instead of by name, the court must make an individualized determination that the restriction of information is necessary and must take reasonable precautions to minimize any prejudicial effect to the defendant. When juror information is restricted, there is a danger that the jurors will interpret the special measures as reflecting on the defendant's guilt or character. The general instruction on the presumption of innocence is not sufficient to address this issue. Therefore, "the circuit court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead names should in no way be interpreted as a reflection of the defendant's guilt or innocence. . . A precautionary statement must not mislead a jury, but must be based on factors and influences that are relevant in a particular case." State v. Tucker, 2003 WI 12, ¶23, ¶24.

While it may be necessary to tailor the precautionary statement for the facts of a particular case, the Committee offers this instruction as a general model.

In State v. Britt, 203 Wis.2d 25, 553 N.W.2d 528 (Ct. App. 1996), the trial court had ruled that the jurors' names, addresses, and places of employment could not be publicly revealed in open court or on the record; however, both parties had access to all juror information via written questionnaires. This was considered to be an "anonymous jury" and its use upheld by the court of appeals because there was a strong reason to believe that the jury needed protection and reasonable precautions were taken to minimize any prejudicial effect to the defendant.

In State v. Tucker, 2003 WI 12, ___ Wis.2d ___, 657 N.W.2d 374, the trial court used only numbers to refer to the jurors, although both parties had access to all juror information, including the jurors' names. The Wisconsin Supreme Court held that this practice, termed a "numbers jury," was subject to the same requirements as those that apply to an anonymous jury and found that the trial court erred in two respects. First, the trial court did not make an individualized determination that the jurors needed protection based on the specific circumstances of the case. Second, the trial court did not take adequate precautions to minimize any prejudicial effect.

See SM-20, Voir Dire, for further discussion of anonymous and "numbers" juries.

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147 IMPROPER QUESTIONS

Disregard entirely any question that the court did not allow to be answered. Do not guess at what the witness' answer might have been. If the question itself suggested that certain information might be true, ignore the suggestion and do not consider it as evidence.

COMMENT

Wis JI-Criminal 147 was originally published in 1962 and revised in 1983 and 1991. This revision made nonsubstantive editorial changes and was approved by the Committee in May 1999.

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148 OBJECTIONS OF COUNSEL; EVIDENCE RECEIVED OVER OBJECTION

Attorneys for each side have the right and the duty to object to what they consider are improper questions asked of witnesses and to the admission of other evidence which they believe is not properly admissible. You should not draw any conclusions from the fact an objection was made.

By allowing testimony or other evidence to be received over the objection of counsel, the court is not indicating any opinion about the evidence. You jurors are the judges of the credibility of the witnesses and the weight of the evidence.

COMMENT

This instruction was originally published as Wis JI-Criminal 215 in 1962 and revised in 1983 and 1991. This revision renumbered it as Wis JI-Criminal 148 and was approved by the Committee in May 1999.

The weight of the evidence and the credibility of witnesses is for the jury. Haley v. State, 207 Wis. 193, 196, 240 N.W. 829 (1932); State v. John, 11 Wis.2d 1, 11, 103 N.W.2d 304 (1960); State v. Lunz, 86 Wis.2d 695, 705, 273 N.W.2d 767 (1979).

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150 STRICKEN TESTIMONY

During the trial, the court has ordered certain testimony to be stricken. Disregard all stricken testimony.

COMMENT

Wis JI-Criminal 150 was originally published in 1962, revised in 1983, and republished without change in 1992. This revision added to the comment and was approved by the Committee in May 1999.

This instruction may be given at the time the testimony is stricken, at the end of the trial, or at both times.

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152 VIEW OF SCENE[1]

You will now be taken to _____ in the custody of the bailiff.

During your trip to and from _____, or while there, you are not to discuss this case with anyone. While at _____, you are not to talk, and no one is to talk to you about the case except the judge.

You are to remain with the other jurors. You are not to conduct an independent investigation of _____ now or at any time during the trial.

Going to _____ is to enable you to better understand the evidence which is introduced in the courtroom and to assist you in weighing and applying that evidence.

What you see there is not evidence in the case and should not be considered as evidence.[2]

COMMENT

Wis JI-Criminal 152 was originally published in 1966 and revised in 1983 and 1991. This revision added footnote 2 and was approved by the Committee in May 1999.

Section 972.06 provides that the "court may order a view by the jury."

A view of the premises is discretionary with the court. Max L. Bloom Co. v. United States Casualty Co., 191 Wis. 524, 529-30, 210 N.W. 689 (1927).

It is improper for counsel to call the attention of the jurors to facts at the scene. Sasse v. State, 68 Wis. 530, 537, 32 N.W. 849 (1887). Where attorneys desire that the jury notice certain things at the site viewed, they should not take it upon themselves to point these out but should work through the court.

1. The instruction is to be given prior to the view. Upon returning from the view, or at the end of the case, or at both times, it may be appropriate to repeat the last two paragraphs, modified as follows:

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Going to (state what was viewed) was to enable you better to understand the evidence presented in the courtroom, and to assist you in weighing and applying that evidence.

What you saw there is not evidence in the case and should not be considered as evidence.

2. The Committee realizes that the distinction that this instruction attempts to make can be a difficult one. Specifically, the troublesome statement is: "What you see there is not evidence in the case and should not be considered as evidence."

However, the Committee confirmed that this is a correct statement of the law. The most recent case to address jury views is State v. Coulthard, 171 Wis.2d 573 (Ct. App. 1992). The court stated: "The purpose of a jury view is to assist the jury in understanding the evidence." Citing: Townsend v. State, 257 Wis. 329, 43 N.W.2d 458 (1950).

In State v. Marshall, 92 Wis.2d 101, 284 N.W.2d 592 (1979), also cited in Coulthard, the court upheld the trial court's decision to allow a view and stated: ". . . the jury was specifically instructed that the view of the scene was not evidence and was not to be considered by it as evidence."

Section 805.08(4) allows jury views in civil cases:

(4) Jury View. On motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision. . . .

In American Family Mutual Insurance Co. v. Shannon, 120 Wis.2d 560, 356 N.W.2d 175 (1984), the court found it was error for the trial judge, sitting without a jury, to make "an unrequested, unannounced, unaccompanied and unrecorded" view of an accident scene. After concluding that the same rules apply to views by the judge or a jury, the court reiterated the standard reflected in Wis JI-Criminal 152:

. . . the viewing of the scene by a judge is justified if it enables the judge to better understand, correctly weigh, and assess the respective credibility of the evidence. A view and the facts or information thereby derived must not be considered as evidence independent of that produced in the course of the trial. The correct purpose of the view is to aid the judge to better understand and weigh the evidence, not to obtain new evidence or independently determine credibility.

So, although the rule that the view is not evidence may be difficult to apply, it remains the law in the state and the Committee determined that it should be communicated to the jury.

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154 SUMMARY OF EVIDENCE

The court has allowed the use of a chart to organize the evidence and to assist you in understanding it. The chart itself is not evidence.[1] It is a summary of some of the evidence that was presented. However, it is the evidence that controls. You should rely on the chart only to the extent that you believe it accurately and properly summarizes the evidence.

COMMENT

Wis JI-Criminal 154 was originally published in 2001. This revision was approved by the Committee in June 2011.

This is an optional instruction to be read, if used at all, at the time an organizational chart or other summary is used by counsel. Any chart or summary inevitably involves editing and selectivity, and it is advisable to tell the jury that it is the actual evidence, not the summary, that controls. This instruction does not apply to "summaries" admitted under § 910.06. See footnote 1.

A trial court's admission of a chart summarizing testimony was affirmed in State v. Olson, 217 Wis.2d 730, 579 N.W.2d 802 (Ct. App. 1998). The chart, which listed the various instances of sexual contact addressed by the evidence, was not considered to be a "summary" of evidence under § 910.06 but was received as "a summary exhibit." [Also referred to as a "pedagogical device."] The court of appeals concluded that the cautionary instruction given by the trial court was a correct statement of the law. That instruction provided:

> I want to caution you with respect to any reliance on this exhibit in that it is to some extent a summary of evidence that was presented at trial.
>
> You observed the manner and way in which the State proceeded with the use of this exhibit, but it is the evidence that controls, and it is your recollection of the evidence that controls, and you should only rely on any summary to the extent that it's consistent with your recollection and to the extent that you feel it accurately and properly summarizes or reflects evidence that you have heard in the case.
>
> So I have received it, but I just want to caution you that it is received as a summary exhibit, and it is the evidence, and the testimony, and your recollection of that which controls.

State v. Olson, supra at 736.

1. This instruction is intended for cases where a party has used a chart, diagram, or other device to help explain or organize the evidence. It is not to be used where "summaries" have been admitted under § 910.06; those summaries are evidence.

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155 EXHIBITS

An exhibit becomes evidence only when received by the court. An exhibit marked for identification and not received is not evidence. An exhibit received is evidence, whether or not it goes to the jury room.

COMMENT

Wis JI-Criminal 155 was originally published in 1962, revised in 1983 and republished without substantive change in 1991 and 2000. A non-substantive editorial correction was made to the Comment in 2018.

The Committee considers giving a separate instruction on exhibits to be optional since its substance is now incorporated in Wis JI-Criminal 103, **EVIDENCE DEFINED**. This instruction may be appropriate where more detailed advice about the status of exhibits is believed to be helpful.

Permitting exhibits to be taken to the jury room is a decision resting within the discretion of the trial court. For a discussion of factors bearing on this discretionary decision, see Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929).

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157 REMARKS OF COUNSEL

Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion.

COMMENT

Wis JI-Criminal 157 was originally published in 1962 and was revised in 1983 and 1991. This revision involved nonsubstantive editorial changes and was approved by the Committee in May 1999.

The "remarks" addressed by this instruction refer to statements by counsel that are not made in opening statement or closing argument, for which there are separate instructions. See Wis JI-Criminal 101, **OPENING STATEMENT**, and Wis JI-Criminal 160, **CLOSING ARGUMENT**.

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158 RECORDING PLAYED TO THE JURY

You are about to (hear an audio recording) (hear and view an audiovisual recording). Recordings are proper evidence and you may consider them, just as any other evidence. Listen carefully; some parts may be hard to understand.

[You may consider the actions of a person, facial expressions, and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]

[You will be provided a transcript to help you listen to the recording. If you notice any difference between what you heard on the recordings and what you read in the transcript(s), you must rely on what you heard, not what you read.]

COMMENT

Wis JI-Criminal 158 was approved by the Committee in February 2010.

This draft was based on an instruction adapted from The Pattern Jury Instructions for the 7th Circuit, 3.17. [Available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf.]

Effective January 1, 2010, SCR 71.01 (2) is amended to create new subsection (e):

(2) All proceedings in the circuit court shall be reported, except for the following:

. . .

(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record.

In the Matter of Amendment of Supreme Court Rule 71.01 Regarding Required Reporting of Court Proceedings. 2009 WI 104

If the jury requests that a recording be played back during jury deliberations, see State v. Anderson, 2006 WI 77, ¶¶30-31, 291 Wis.2d 673, 717 N.W.2d 74: the jury should return to the courtroom and the recording should be played for the jury in open court.

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160 CLOSING ARGUMENTS OF COUNSEL

Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence, and decide upon your verdict according to the evidence, under the instructions given you by the court.

COMMENT

Wis JI-Criminal 160 was originally published in 1962, revised in 1983, and republished without change in 1991. This revision was approved by the Committee in May 1999.

Wis JI-Criminal 160 (© 1962) was cited with approval in State v. Draize, 88 Wis.2d 445, 455-565, 276 N.W.2d 784 (1979).

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161 AGREED TESTIMONY

The district attorney and the attorney for the defendant have stipulated or agreed that if _(name of witness)_ had been called as a witness, (he) (she) would have testified as follows:

[state agreed testimony]

You will consider that testimony in the same manner as if it had been given under oath here in court.

COMMENT

Wis JI-Criminal 161 was approved by the Committee in December 1995 and was republished without substantive change in 2000.

This instruction is designed for situations where the parties have agreed that if a witness had been called to testify, the witness would have testified to certain facts. The jury is instructed to regard that agreed testimony in the same manner as if it had been given by a live witness in court.

For an instruction on agreed facts, see Wis JI-Criminal 162.

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162 AGREED FACTS

[IF THE AGREED FACTS GO TO AN ELEMENT OF THE CRIME, A PERSONAL WAIVER BY THE DEFENDANT IS REQUIRED.][1]

The district attorney and the attorney for defendant have stipulated or agreed to the existence of certain facts, and you must accept these facts as conclusively proved. (In this case, the district attorney and defendant's attorney have stipulated to the following facts:)

[state the agreed facts][2]

COMMENT

Wis JI-Criminal 162 was originally published in 1962 and revised in 1983. The comment was updated in 1990. The 1995 revision added the bracketed material at note 1. The instruction was republished without substantive change and with an updated comment in 2000.

The Committee recommends giving this instruction at the time the stipulation is received and as part of the instructions at the end of the case.

While the instruction states that the "district attorney and the attorney for the defendant have stipulated," it is good practice to assure that the defendant understands and joins in the agreement. This avoids later argument whether the stipulation involved an issue on which the defendant's personal participation was required or merely a matter of trial tactics within the purview of defense counsel. See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

Strictly speaking, a stipulation is an agreement between the parties. As such, the state is not required to join in a proposed stipulation. However, an offer by the defendant to admit a fact may make further proof of that fact unnecessary, either because such proof would be irrelevant or because its probative value would be outweighed by the risk of unfair prejudice. See State v. McCallister, 153 Wis.2d 523, 451 N.W.2d 764 (Ct. App. 1989).

Also see Meyers v. State, 193 Wis. 126, 127, 213 N.W. 645 (1927): ". . . the admission of the existence of a fact dispenses with proof thereof."

The trial court's role with regard to stipulations offered by the parties was discussed in Birts v. State, 68 Wis.2d 389, 395-96, 228 N.W.2d 351 (1975):

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> . . . as a matter of public policy the entire judicial process in a criminal or civil proceeding is a search for truth, and the trial court's important role as a fact finder should not be usurped by the district attorney entering into a stipulation on a matter of fact which, in the end, has to be determined by the finder of fact. . . .
>
> Therefore, we conclude that the trial court possessed the power to refuse to accept the stipulation proposed by the assistant district attorney in this case and, in so refusing, was free to make findings contrary to its terms.

The Birts case involved a stipulation offered in connection with a motion to withdraw a guilty plea. The parties offered to agree that the defendant would not have pled guilty had he known of the effect on his mandatory release date.

1. Special caution must be exercised when an offered stipulation removes an element of the crime from the jury's consideration. In that situation, the defendant must personally waive the right to have the jury find the element beyond a reasonable doubt. See State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), discussed in the Comment to Wis JI-Criminal 990. But see State v. Benoit, 229 Wis.2d 630, 600 N.W.2d 193 (Ct. App. 1999): it was not error to fail to obtain an express, personal, waiver where a stipulation as to nonconsent was obtained in a burglary case.

2. The last portion of this instruction (in parentheses) is optional because the Committee has concluded that by attempting to paraphrase stipulations, the trial judge may commit unintentional error by doing so incorrectly. This danger can be minimized if all stipulations are required to be put into writing before being accepted by the court.

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162A LAW NOTE: STIPULATIONS

CONTENTS

Scope

I. True Stipulations
II. Stipulations That Go To An Element Of The Crime
III. Offers to Stipulate; "Concessions"

Scope

This Law Note addresses the issues that arise when a defendant offers to agree that a fact is established.

I. True Stipulations

A. Definition

Strictly speaking, a "stipulation" is an agreement between the parties that a fact will be accepted as established.[1] The agreement — the stipulation — is a substitute for proof of a fact by testimony or other evidence.[2]

Because a true stipulation is an agreement between the parties, neither the state nor the defendant is required to enter into a stipulation. [See Part III. Offers to Stipulate; "Concessions"]

B. Recommended Procedure

The Committee recommends that the following procedure be used when the parties offer a stipulation:

- the parties should clearly identify the agreement on the record;

- personal inquiry should be made of the defendant to establish that he or she agrees with the stipulation[3];

- the jury is instructed to accept the stipulated fact as conclusively proved;

- the instruction also provides for an optional sentence in which the agreed facts would be stated. The sentence is described as optional because the Committee

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concluded that by attempting to paraphrase stipulations, the trial judge may commit unintentional error by doing so incorrectly. This danger can be minimized if all stipulations are required to be put into writing before being accepted by the court.

C. Jury Instruction

Wis JI-Criminal 162, Agreed Facts, provides as follows:

The district attorney and the attorney for the defendant have stipulated or agreed to the existence of certain facts, and you must accept those facts as conclusively proved.

II. Stipulations That Go To An Element Of The Crime

A. In General

The Committee believes the following are the correct legal principles to apply where a stipulation goes to an element of the crime:

• a stipulation may be offered as to proof of an element;

• as with any other stipulation, the agreement of both parties is required;

• when a stipulation is accepted as to proof of an element, a waiver should be obtained; what the defendant is waiving is not the submission of the element as part of the offense definition, but rather the right not to have a verdict directed as to an element of the crime[4];

• an element of the crime is, with one exception,[5] never completely removed from the jury's consideration.

B. Recommended Procedure

When using the term "stipulation," this discussion refers to a true stipulation — agreed to by both the defense and the prosecution.

• As with any other stipulation, the court should address the defendant personally to assure that the defendant understands the stipulation and joins in it.

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• The court should also make sufficient inquiry of the defendant to assure that defendant knowingly and understandingly waives the right to what is in effect a partial directed verdict on an element of the crime.[6]

• With one exception, the element will still be presented to the jury as part of the offense definition.

• As with any other stipulation, the jury will be told to accept the facts stipulated to — here, an element — as conclusively proved.

C. Example: Possession Of A Firearm By A Felon — § 941.29

The stipulation would state that the parties agree that the defendant had been convicted of a felony [or satisfied one of the other categories covered by the statute].[7]

A waiver should be obtained from the defendant, confirming his or her understanding that the jury will be instructed to accept the element as proved.[8]

The "convicted of a felony" element would still be included in the offense definition and included in the jury instructions.

The jury would be instructed that:

"The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved."[9]

Proof of the nature of the felony and evidence of the circumstances giving rise to the felony conviction is not admissible.[10]

D. Exception: Operating With A Prohibited Alcohol Concentration – Stipulation that goes to the "status element" removes that element from the jury's consideration

Under Wisconsin's operating while intoxicated [OWI] laws, the prohibited alcohol concentration level is reduced if the driver has prior convictions, suspensions or revocations related to OWI. Originally, two or more priors reduced the level from 0.10 to 0.08. Under current law, three or more priors reduce the applicable level from 0.08 to 0.02. Because the fact of priors changes the substantive definition of the crime, that fact is an element to be submitted to the jury.

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The 0.08 version of the law was addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). The Wisconsin Supreme Court referred to the prior convictions element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The "prohibited alcohol concentration" means 0.08 . . .
> 214 Wis.2d 628, 651-52.

Wis JI-Criminal 2660C applies the Alexander rule to 0.02 offenses under current law. The third element addresses the fact of three or more priors and has been placed in brackets. If the defendant admits the "status element," the instruction is to be given with two elements: operating a vehicle, and, having an alcohol concentration of more than 0.02. If the defendant does not admit the "status element," the instruction should be given with a third element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1). Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

NOTE: Under the procedure required by the Alexander decision, the stipulation procedure described in this Law Note does not apply:

1) Agreement by the state that the fact of priors is established is not required.
2) Consent by the state to the waiver of jury trial on the prior conviction element is not required.
3) The prior conviction element is completely withdrawn from the jury's consideration.

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The Alexander procedure — whereby an element is actually removed from the jury's consideration — has not been extended to other situations. See, State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557.[11]

The Committee recommends adopting this same procedure in a second situation: where the prohibited alcohol concentration is reduced to 0.02 for those who satisfy the "status element" of being subject to an order under § 343.301 to install an ignition interlock device. See Wis JI-Criminal 2600D.

III. Offers to Stipulate; "Concessions"

True stipulations should be distinguished from offers to stipulate or offers to concede that a fact is established. The latter have been referred to as "Wallerman stipulations," taking their name from the court of appeals decision in State v. Wallerman, 203 Wis.2d 158, 552 N.W.2d 128 (Ct. App. 1996). Wallerman involved a postconviction challenge to other acts evidence that had been admitted on the issues of motive and intent. The court of appeals found that the defendant was not entitled to relief because he had failed to affirmatively concede the motive and intent issues. However, the court set out a four-part methodology for trial courts to use in situations where the defendant did offer to concede an issue. 203 Wis.2d 158, 167-168.

The Wallerman decision was relied on by State v. DeKeyser, 221 Wis.2d 435, 585 N.W.2d 668 (Ct. App. 1998), where the court of appeals reversed a conviction due to ineffective assistance of counsel. The court found that counsel engaged in deficient performance by failing to offer a Wallerman stipulation to avoid the admissibility of other acts evidence.

The Wisconsin Supreme Court addressed "Wallerman stipulations" in State v. Veach, 2002 WI 110, ¶118, 255Wis.2d 390, 645 N.W.2d 913, holding that if offers to stipulate or concede are not accepted or joined in by the prosecution, the court is not required to accept them:

> We determine that to the extent that Wallerman and DeKeyser imply that the state and the circuit court are obliged to accept Wallerman stipulations, those cases are incorrect and must be overruled. . . While we do not hold that Wallerman stipulations are invalid per se, we do hold that, with the exception of stipulations as to the defendant's status, the state and the court are not obligated to accept stipulations to elements of a crime even if the stipulations are offered in compliance with the four-part test set forth in Wallerman.

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COMMENT

Wis JI-Criminal 162A was approved by the Committee in February 2011.

1. See, for example, Black's Law Dictionary, 7th Edition: "A voluntary agreement between opposing parties concerning some relevant point."

2. ". . . [T]he admission of a fact dispenses with proof thereof." Myers v. State, 193 Wis. 126, 127, 213 N.W. 645 (1927).

3. It is good practice to assure that the defendant understands and joins in the agreement. This avoids later argument about whether the stipulation involved an issue on which the defendant's personal participation was required or merely a matter of trial tactics within the purview of defense counsel. See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

4. This might be called a "partial jury trial waiver," a term Wisconsin appellate courts have used primarily to refer to completely withdrawing an element from the jury's consideration. See, for example, State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557; State v. Benoit, 229 Wis.2d 630, 600 N.W.2d 193 (Ct. App. 1999); State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989). That brings into play the rule that the state, and the trial court, are not required to join in that complete waiver. However, the right to a jury trial can be viewed as incorporating additional rights, such as not directing a verdict against the defendant on an element of the crime. When a stipulation is accepted as to an element, that element still goes to the jury and the jury is told the element is "conclusively proved." Telling the jury that an element is "conclusively proved" implicates the right not to have a verdict directed on an element. Thus, the Committee recommends that the trial court assure that the record shows that the defendant understands this and waives the right not to have a verdict [partially] directed against him. Whether this is done as part of the stipulation procedure or viewed as a separate waiver inquiry should not make any difference. A general question about whether the defendant "is still interested in" entering into a stipulation is not sufficient. State v. Hauk, 2002 WI App 226, 257 Wis.2d 579, 652 N.W.2d 393.

5. The Wisconsin Supreme Court has recognized one situation where an element can be removed from the jury's consideration: a stipulation going to the prior convictions, suspensions, or revocations that reduce the prohibited alcohol concentration from 0.08 to 0.02. See State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), discussed below at Section II. D. The Committee has concluded that the Alexander approach should also apply in a second situation: where the prohibited alcohol concentration is reduced to 0.02 for those who satisfy the "status element" of being subject to an order under § 343.301 to install an ignition interlock device. See Wis JI-Criminal 2600D.

6. A suggested script regarding the waiver of the right to full jury consideration of the element:

> Your right to a jury trial includes the right to have the jury consider all relevant evidence as to each element of the crime. If the proposed stipulation is accepted as to an element of the crime charged against you, that element will still be presented to the jury but the jury will be told that the element is "conclusively proved." Do you understand? Do you wish to proceed with the proposed stipulation?

For an example of a complete waiver inquiry, see note 8, below.

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7. The example is for violations of § 941.29 involving possession of a firearm by a person convicted of a felony. However, the statute also applies to other categories of individuals. See § 941.29(1)(a) through (g).

8. An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of felon in possession of a firearm is that you have been convicted of a felony before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that you have been convicted of a felony before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that you have been convicted of a felony before the date of this offense?

4. With this stipulation, you are agreeing that I tell the jury that you have been convicted of a felony before the date of this offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understand (his) (her) right to enter into this agreement regarding (his) (her) prior conviction or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court therefore accepts the stipulation.

9. This is the approach recommended in Wis JI-Criminal 1343, the instruction for violations of § 941.29. It is consistent with the description of the effect of a stipulation in a prosecution for violating § 941.29 in State v. McAllister, 153 Wis.2d 523, 451 N.W.2d 764 (Ct. App. 1989).

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10. Old Chief v. United States, 519 U.S. 172 (1997); State v. McAllister, supra, note 9. "When the defendant agrees to a sanitized stipulation admitting the prior conviction, there is no need for further proof relating to the nature of the conviction." State v. Warbelton, 2009 WI 6, ¶53, 315 Wis.2d 253, 759 N.W.2d 557.

11. In State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557, the defendant urged that the Alexander approach be applied to the crime of stalking under § 940.32(2m)(a) which provides an increased penalty for stalking offenses where the defendant has a previous conviction for a violent crime. The Wisconsin Supreme Court declined to extend Alexander:

> ¶46 Despite the parallels between Alexander and this case, we decline to extend Alexander's holding to the stalking statute. Alexander is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. In these unique cases, the risk of unfair prejudice is extremely high given the likelihood that jurors will make prohibited inferences based on the fact of multiple prior convictions, suspensions, or revocations.

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165 JUDICIALLY NOTICED FACTS

CAUTION: IT IS ERROR TO GIVE THIS INSTRUCTION AS TO FACTS THAT CONSTITUTE AN ELEMENT OF THE CRIME.

The court has taken judicial notice of certain facts and you are directed to accept the following as true:

[state facts judicially noticed]

COMMENT

Wis JI-Criminal 165 was originally published in 1966 and revised in 1983. It was republished without substantive change in 1991 and 2000. This revision was approved by the committee in December 2002.

The Committee recommends giving this instruction at the time judicial notice is taken and as part of the instructions at the end of the case.

Section 902.01 of the Wisconsin Rules of Evidence addresses judicial notice.

The caution at the top of the instruction was added in response to the decision in State v. Harvey, 2002 WI 65, 254 Wis.2d 442, 649 N.W.2d 189, which held that it is error to give a judicial notice jury instruction as to facts that constitute an element of the crime. In Harvey, the defendant was charged with possession of cocaine with intent to deliver "within 1,000 feet of Penn Park." The state rested without introducing proof that Penn Park was a city park. Harvey moved for a directed verdict on the penalty enhancer and the state moved to reopen. The trial judge denied both motions, but took judicial notice that Penn Park was a city park. The judge instructed the jury that "[t]he Court has taken judicial notice of certain facts and you are directed to accept the following as true: Penn Park is a city park located in the City of Madison, Dane County, Wisconsin."

The Wisconsin Supreme Court held that the facts constituting the "within 1,000 feet of . . ." penalty enhancer under § 961.49 are the same as elements of the crime, and that the jury instruction on judicially noticed facts directed a verdict on an element. "This had the effect of not merely undermining but eliminating the jury's opportunity to reach an independent, beyond-a-reasonable-doubt decision on that element, and was therefore constitutional error." 2002 WI 65, ¶34. But the error was harmless: because the fact was "undisputed and indisputable . . . it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found the defendant guilty of the enhanced offense." 2002 WI 65, ¶48.

The decision did not hold that it was improper for the trial court to take judicial notice of status of the park and did not directly state that the jury instruction provision of the judicial notice statute — § 902.01(7)

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— was unconstitutional. The decision did hold that implementing sub. (7) as to an element of the crime is a due process violation.

Section 902.01(7) differs from the federal version of the comparable evidence rule as it is applied in criminal cases. While the Wisconsin provision states that the judge "shall instruct the jury to accept as established any facts judicially noticed" without distinguishing between civil and criminal cases, the federal version provides that the jury in a criminal case is to be instructed that it "may, but is not required to, accept as conclusive any fact judicially noticed." Federal Rule of Evidence 201(g). The court in Harvey declined to rewrite the Wisconsin rule to follow the federal approach. 2002 WI 65, ¶34.

In light of Harvey, the continued viability of the holding in State ex rel. Cholka v. Johnson, 96 Wis.2d 704, 713, 292 N.W.2d 841 (1980), is doubtful. The case holds that it was proper for the trial court to take judicial notice of the fact that Southern Comfort is an intoxicating liquor and that excessive consumption of an intoxicating liquor can cause death.

"A trial court . . . may . . . take judicial notice of a fact that is not subject to reasonable dispute, but it may not establish as an adjudicative fact that which is known to the judge as an individual." State v. Peterson, 222 Wis.2d 449, 457, 588 N.W.2d 84, (Ct. App. 1998). Thus, it was error for a trial judge to "rely on his own experience on the river at night to determine whether the videotape was an accurate portrayal of the demonstration." 222 Wis.2d 449, 458.

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170 CIRCUMSTANTIAL EVIDENCE

It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.

Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.

Whether evidence is direct or circumstantial, it must satisfy you beyond a reasonable doubt that the defendant committed the offense before you may find the defendant guilty.

IF EVIDENCE OF FLIGHT, ESCAPE, OR CONCEALMENT HAS BEEN ADMITTED, SEE WIS JI-CRIMINAL 172. IF EVIDENCE OF POSSESSION OF RECENTLY STOLEN PROPERTY HAS BEEN ADMITTED, SEE WIS JI-CRIMINAL 173.

COMMENT

Wis JI-Criminal 170 was originally published in 1966 and revised in 1978 and 1991. This revision was approved by the Committee in June 1999.

The 1999 revision involved a substantial rewriting of the former instruction, adapted from Wis JI-Civil 230. One change is to make it applicable to evidence submitted by either the state or the defendant. The need to change the old model to account for defense evidence was one of the issues in State v. Shah, 134 Wis.2d 246, 397 N.W.2d 492 (1986), where the jury was told that the general instruction on circumstantial evidence could apply to the defendant's evidence and that they should "interpolate how that would apply to the defendant rather than the state." The problem was that instruction referred to the "beyond a reasonable doubt" burden. While the court found that a reasonable jury would not be misled by these statements, the Committee concluded that it was advisable to rewrite Wis JI-Criminal 170 in a manner that could be applied to evidence presented by either the state or the defense.

Circumstantial evidence questions are often paired with the "reasonable hypothesis of innocence" issue. Reference to the latter issue is part of the burden of proof instruction, see Wis JI-Criminal 140,

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footnote 2. Also see State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990). The following shows how the two issues are often combined:

> The evidence does not have to remove every possibility before a conviction can be sustained. See State v. Eberhardt, 40 Wis.2d 175, 161 N.W.2d 287 (1968). The test stated in State v. Johnson, 11 Wis.2d 130, 136, 104 N.W.2d 379 (1960), is 'that all the facts necessary to warrant a conviction on circumstantial evidence must be consistent with each other and with the main fact sought to be proved and the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.' The circumstantial evidence must, however, be sufficiently strong to exclude every reasonable theory of innocence, that is, the evidence must be inconsistent with any reasonable hypothesis of innocence. This is a question of probability, not possibility. State v. Shaw, 58 Wis.2d 25, 29, 205 N.W.2d 132 (1973).

For good general discussions of circumstantial evidence, see Schwantes v. State, 127 Wis. 160, 106 N.W 237 (1906); Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909); State v. Johnson, 11 Wis.2d 130, 104 N.W.2d 379 (1960); and State ex rel. Hussong v. Froelich, 62 Wis.2d 577, 215 N.W.2d 390 (1974).

It has been held to error to refuse to give a requested instruction on circumstantial evidence when the state's case depends wholly or substantially upon such evidence. Kollock v. State, 88 Wis.663, 60 N.W. 817 (1894); Colbert v. State, 125 Wis. 423, 104 N.W. 61 (1905). However, it is not error to refuse to give a requested instruction when circumstantial evidence is not a substantial part of the state's case. Anderson v. State, 133 Wis. 601, 114 N.W. 112 (1907). And it has been held that the failure to instruct in the absence of a request is not error. Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909).

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172 CIRCUMSTANTIAL EVIDENCE: FLIGHT, ESCAPE, CONCEALMENT

Evidence has been presented relating to the defendant's conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.

COMMENT

Wis JI-Criminal 172 was originally published in 1978 and revised in 1991. This revision was approved by the Committee in September 1999.

This instruction may be used when sufficient evidence of flight or other conduct after the alleged crime has been offered to sustain a finding of guilty knowledge. Whether to give an instruction on this topic is within the discretion of the court. If this instruction is given, it may be appropriate to include it immediately after, or as part of, Wis JI-Criminal 170, **CIRCUMSTANTIAL EVIDENCE**.

A strong argument can be made that an instruction on this topic is unnecessary, but the Committee decided to republish this revised version rather than withdraw the instruction entirely. An instruction on this topic may continue to be requested, especially where case law can be found supporting the concept addressed here. The material below summarizes the relevant legal authority and points out the potential problems that need to be avoided in attempting to craft an instruction on this topic.

As a general rule, it has been held that evidence of flight, escape, or concealment by an accused has probative value as to guilt. The most typical situation involves flight from the crime scene. See Wangerin v. State, 73 Wis.2d 427, 437, 243 N.W.2d 448 (1976). The rule extends to escapes from custody while the charges are pending. State v. Knighten, 212 Wis.2d 833, 839-40, 569 N.W.2d 770 (Ct. App. 1997); Gauthier v. State, 28 Wis.2d 412, 419-20, 137 N.W.2d 101 (1965). Evidence of flight by a codefendant can be admissible if it "was so closely connected with the commission of the crime as to be admissible as **res gestae**." State v. Winston, 120 Wis.2d 500, 504, 355 N.W.2d 553 (Ct. App. 1984).

The rule has been extended beyond "flight" to other "criminal acts of an accused which are intended to obstruct justice or avoid punishment [which] are admissible to prove a consciousness of guilt of the principal criminal charge." State v. Bettinger, 100 Wis.2d 691, 698, 303 N.W.2d 585 (1981) [evidence of bribery is admissible to show consciousness of guilt on a charge of sexual assault]; State v. Neuser, 191 Wis.2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995) [evidence of a threatening phone call is admissible to show consciousness of guilt on a charge of aggravated battery]. Also see Peters v. State, 70 Wis.2d 22, 30, 233 N.W.2d 420 (1975) [evidence of a fabricated alibi is relevant to a burglary charge]. Evidence of noncriminal acts of concealment are also covered. State v. Paulson, 118 Wis. 89, 94 N.W.2d 771 (1903).

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For a recent discussion of the admissibility of flight evidence, see State v. Miller, 231 Wis.2d 447, 605 N.W.2d 567 (Ct. App. 1999). Admitting flight evidence is within the court's discretion even if other criminal charges based on the same conduct have been severed. Miller, 231 Wis.2d 447, 461-62.

The propriety of giving correct instructions on flight evidence is also generally recognized. See Devitt and Blackmar, Federal Jury Practice and Instructions, § 15.08. However, at least one state, Missouri, has apparently determined that instructions on flight should not be given. State v. Coleman, 254 S.W.2d 27 (Mo., 1975). The Wisconsin Supreme Court has not specifically reviewed flight instructions but has recognized their propriety in an unpublished opinion. State v. Gill, per curiam, May 2, 1978.

A series of United States Supreme Court cases have discussed the limits on flight instructions. Instructions that refer to flight as a "silent admission of guilt," or which include such language as "the wicked flee, when no man pursueth, but the innocent are as bold as a lion," have been found clearly erroneous. Hickory v. United States, 160 U.S. 408, 16 S.Ct. 327, 40 L.Ed. 474 (1896); Alberty v. United States, 162 U.S. 499, 16 S.Ct. 864, 40 L.Ed. 1051 (1896); Starr v. United States, 164 U.S. 627, 17 S.Ct. 223, 41 L.Ed. 577 (1896). However, there is no error in instructing the jury in a way that is not misleading, on the well-settled law that the flight of the accused is competent evidence against him as having a tendency to establish guilt. Allen v. United States, 164 U.S. 492, 17 S.Ct. 156, 41 L.Ed. 530 (1896); and Bird v. United States, 187 U.S. 118, 23 S.Ct. 42, 47 L.Ed. 100 (1902).

There are a number of problems in developing a fair flight instruction. First, characterizing the evidence as evidence of "flight" prejudges an issue that is often for the jury to determine. In many cases the jury will first have to decide whether the defendant's actions did constitute "flight." In State v. Sullivan, 203 A.2d 179 (1964), the Supreme Court of New Jersey was concerned with the misuse of "flight" when the evidence showed only "departure." Departure alone raises no inference of guilt, and "[f]or departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt." Sullivan, supra, at 192. The uniform instruction tries to meet this problem by using the general term "conduct" instead of "flight."

A second problem is that even if the conduct amounts to "flight," it may be engaged in by people who are not guilty of a crime. This was recognized by the United States Supreme Court in Alberty v. United States:

> . . . it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. . . . Innocent men sometimes hesitate to confront a jury - not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves. Alberty v. United States, 162 U.S. 499, 511, 16 S.Ct. 864, 40 L.Ed. 1051 (1896).

Thus flight evidence is probative of guilt only insofar as it indicates a consciousness of guilt and insofar as consciousness of guilt indicates actual guilt. United States v. Myers, 55 F.2d 1036 (5th Cir.

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1977); and Miller v. United States, 320 F.2d 767 (D.C. Cir. 9163) (concurring opinion). The uniform instruction tries to state this connection in a forthright manner.

Finally, it has been held that an "antiflight" instruction need not be given where the defendant asks that the jury be instructed that his failure to flee should be considered as a circumstance in his favor. United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

The previous version of the instruction used the general term "conduct or whereabouts" instead of "flight," "escape," "concealment," etc. The Committee believed that using the latter to characterize the defendant's conduct answers one of the questions that the jury must consider: did the conduct of the defendant constitute flight? This revision deletes "whereabouts" in favor of relying on "conduct" as a general term allowing consideration of a broader range of conduct than the physical fleeing from the scene of a crime. However, great caution must be taken not to use this instruction when the "conduct" involves the defendant's silence at the time of arrest. It is improper for the judge or the prosecutor to comment on that type of conduct. See Reichhoff v. State, 76 Wis.2d 375, 251 N.W.2d 470 (1977), and cases cited therein.

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173 CIRCUMSTANTIAL EVIDENCE – POSSESSION OF RECENTLY STOLEN PROPERTY

Evidence has been presented that the defendant possessed recently stolen property. Whether the evidence shows that the defendant [knew the property had been stolen] [or] [participated in some way in the taking of the property] is exclusively for you to decide. Consider the time and circumstances of the possession in determining the weight you give to this evidence.

COMMENT

Wis JI-Criminal 173 was originally published in 1980. It was revised in 1987 and republished without change in 1991. This revision was approved by the Committee in October 1999.

This instruction may be used when sufficient evidence of unexplained possession of recently stolen property has been offered to sustain a finding of guilty knowledge or participation in the taking of the property by the defendant. Whether to give an instruction on this topic is within the discretion of the court. If this instruction is given, it may be appropriate to include it immediately after, or as part of, Wis JI-Criminal 170, **CIRCUMSTANTIAL EVIDENCE**.

See Wis JI-Criminal 920 for a definition and discussion of "possession."

A strong argument can be made that an instruction on this topic is unnecessary, but the Committee decided to republish this revised version rather than withdraw the instruction entirely. An instruction on this topic may continue to be requested, especially where case law can be found supporting the concept addressed here. That case law presents potential problems, especially since the concept has often been addressed by reference to a "presumption" flowing from possession of recently stolen property. Instructing in those terms is to be avoided.

Caution should be exercised in giving an instruction on this topic because the relevance of evidence of possession of recently stolen property can vary a great deal, depending on the facts of the case. An 1880 decision of the Wisconsin Supreme Court described the issue and offered a caution about instructing the jury:

> It is evident that mere possession of stolen goods by a party accused ought not to be in every case, if in any, sufficient evidence to justify a conviction. Take the case of a reputable citizen, whose character is such that no suspicion of crime has attached to him, charged with stealing a

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> horse, and the only proof is that the horse was found, the next morning after he was stolen, in his stable, the stable being one which could be entered without the aid of the accused. Clearly in such a case the presumption of innocence would outweigh the inference of guilt arising out of the fact of possession. So, if a purse of money had been stolen in a crowd, and soon after the theft the same had been found in the pocket of a man of known reputable character, the pocket being such that the purse could have been put there without his knowledge, the circumstance would hardly raise a suspicion sufficient to lean a charge of theft upon. It is not so much the mere possession of the stolen goods, as it is the nature of the possession; whether it is an open and unconcealed one, or whether the goods are such as the person found in possession thereof would probably be possessed of in a lawful way. If property of great value should be found in the possession of one known to be poor, so as to render it highly improbable that he had purchased it, an inference of guilt would arise much stronger than if such property were found in the possession of a man of wealth, who would probably purchase goods of such value. It would be impossible to enumerate the variety of circumstances attending the mere possession of stolen goods, which would lessen or increase the inference of guilty possession. In directing a jury, therefore, as to the weight they should give to the possession of stolen goods or the instruments of crime as evidence of guilt, care should be taken not to place too much importance upon the mere possession, but their attention should be called to the character of the possession and the circumstances attending it.

Ingalls v. State, 48 Wis. 647, 657-58, 4 N.W. 785 (1880).

The evidentiary rule that unexplained possession of recently stolen goods may raise an inference that the possessor is guilty of the taking of the property is generally recognized in Wisconsin. This rule was described by the Wisconsin Supreme Court in State v. Johnson, 11 Wis.2d 130, 104 N.W.2d 379 (1960):

> Mere possession of stolen property raises no inference of guilt, but Wisconsin from early times has followed the rule that unexplained possession of recently stolen goods raises an inference of greater or less weight, depending on the circumstances, that the possessor is guilty of the theft and also of burglary if they were stolen in a burglary. Such inference being in the nature of a presumption of fact calls for an explanation of how the possessor obtained the property. Such presumption is not conclusive and may be rebutted.

State v. Johnson, at 139.

Johnson has been cited with approval in State v. Bohachef, 50 Wis.2d 694, 185 N.W.2d 339 (1971); Gautreaux v. State, 52 Wis.2d 489, 190 N.W.2d 542 (1971); and Day v. State, 61 Wis.2d 236, 212 N.W.2d 489 (1973).

However, it should be noted that each of the cited cases dealt only with the sufficiency of the evidence, judged from the viewpoint of the appellate court. None dealt with the propriety of a jury instruction.

The propriety of a jury instruction dealing with the effect of unexplained possession of recently stolen property was recognized by the United States Supreme Court in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). Barnes approved an instruction that advised the jury as follows:

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"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." Note that Barnes dealt with a finding of knowledge that the property had been stolen. The Wisconsin cases expanded this rule to apply to a finding of guilt on the underlying theft itself. It should also be noted that Barnes involved a case tried in federal court, where the trial judge has greater latitude in commenting on the evidence than a state trial judge has.

While the most recent Wisconsin Supreme Court cases dealt with the issue only in reviewing the sufficiency of the evidence, a series of four older decisions specifically considered jury instructions. In Ryan v. State, 83 Wis. 486, 53 N.W. 836 (1892), a jury instruction on the presumption arising from possession of recently stolen property was approved. The court held it was not error to give such an instruction because it was clearly indicated that the presumption applied only if the possession was unexplained and if guilt was supported by all the evidence.

In Ingalls v. State, 48 Wis. 647, 4 N.W. 785 (1880), a conviction was reversed because the instruction on the presumption arising from possession of stolen property was error. The same conclusion was reached in State v. Snell, 46 Wis. 524, 1 N.W. 225 (1879). In both cases, the court based its decision on the overemphasis given to the possession of the property. In the earliest case in the series, Graves v. State, 12 Wis. 659 (1860), a jury instruction on the presumption was criticized but not found to be grounds for reversal because there was a lack of proper objection and an assumption by the appellate court that the jury instructions that were not part of the appellate record probably stated the law correctly.

The Committee advises that caution be used in trying to translate the evidentiary rule discussed above into a jury instruction. For one thing, following the language from the Johnson case and instructing the jury in terms of a "presumption calling for an explanation" might shift the burden of proof to the defendant or relieve the prosecution of its burden to prove all elements of the crime beyond a reasonable doubt. A second concern is the emphasis on the possession of stolen property being "unexplained." While the probative value of possession rests on it being unexplained, including such emphasis in the jury instruction creates a danger of impermissibly commenting on the defendant's failure to testify. For that reason, the Committee has omitted "unexplained" from the instruction.

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175 MOTIVE

[USE THE TWO SENTENCES IN BRACKETS ONLY IF INTENT IS AN ELEMENT OF THE CRIME CHARGED.]

[Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not.]

[USE THE FOLLOWING IN ALL CASES WHERE AN INSTRUCTION ON MOTIVE IS BELIEVED TO BE APPROPRIATE.]

"Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

COMMENT

Wis JI-Criminal 175 was originally published in 1962, revised in 1983, and republished without change in 1991. This revision was approved by the Committee in February 1999 and was intended to make the instruction more understandable without changing its meaning.

The original version of this instruction was based on statements in Cupps v. State, 120 Wis. 504, 518, 97 N.W. 210 (1904), and Wittig v. State, 235 Wis. 274, 292 N.W. 879 (1940). More recent cases have restated this general rule, for example:

> Motive is not an element of any crime and does not by itself establish guilt or innocence. But evidence of motive is relevant if it meets the same standards of relevance as other evidence. Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it is entitled to.

State v. Berby, 81 Wis.2d 677, 688, 260 N.W.2d 798 (1977).

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The admissibility of evidence of motive is to be evaluated on the same terms as other evidence: it must be relevant and its probative not outweighed by danger of unfair prejudice. Kelly v. State, 75 Wis.2d 303, 320, 249 N.W.2d 800 (1977); State v. Phillips, 99 Wis.2d 46, 54-5, 298 N.W.2d 239 (Ct. App. 1980).

If evidence of motive is admitted, the defendant is entitled to challenge it. The original version of this instruction included the following statement in the comment: "It was held in Runge v. State, 160 Wis. 8, 150 N.W.2d 977 (1915), that where it was claimed by the state that one motive for the uxoricide [wife killing] was defendant's desire to secure his wife's property, he was entitled, upon request, to have the jury instructed as to the law under which, upon her death, her property would descend to other persons."

Other cases analyzing the admissibility of evidence of motive include: State v. Jansky, 258 Wis. 182, 45 N.W.2d 78 (1950); Holmes v. State, 76 Wis.2d 259, 251 N.W.2d 56 (1977); Milenkovic v. State, 86 Wis.2d 272, 283 N.W.2d 320 (Ct. App. 1978).

Also see two cases addressing the problems that arise when the evidence of motive involves evidence of "other acts" covered by the rules in § 904.02. State v. Tabor, 191 Wis.2d 482, 529 N.W.2d 915 (Ct. App. 1995); State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996).

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180 STATEMENTS OF DEFENDANT

The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the defendant. It is for you to determine how much weight, if any, to give to (the) (each) statement.

In evaluating (the) (each) statement, you must determine three things:[1]

- whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
- whether the statement was accurately restated here at trial.
- whether the statement or any part of it ought to be believed.

ADD THE FOLLOWING IF A STATEMENT RESULTING FROM AN UNRECORDED CUSTODIAL INTERROGATION IS ADMITTED AT A TRIAL FOR A FELONY AND NO EXCEPTION APPLIES

[It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony. You may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in this case.]

CONTINUE WITH THE FOLLOWING IN ALL CASES

You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

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COMMENT

Wis JI-Criminal 180 was originally published in 1962 and revised in 1967, 1991, 1999, 2007, and 2008. This revision was approved by the Committee in July 2015; it changed the title to "Statements of Defendant" and added to the Comment; no change was made in the text.

1. The list that follows may be modified where a matter listed is not at issue in the case. For example, if there is a recorded statement, the first two matters may not be subject to dispute.

The Recording Requirement — § 973.155

The 2007 revision of this instruction was intended to comply with requirements imposed by 2005 Wisconsin Act 60. Act 60 created § 968.073, Recording custodial interrogations, which provides that "it is the policy of this state" to make an audio or audio-visual recording of any custodial interrogation of a person suspected of committing a felony, unless certain exceptions apply. Act 60 also created § 972.115, Admissibility of defendant's statement, which, in sub. (2)(a) provides that if a statement resulting from an unrecorded custodial interrogation is admitted at trial – and no exception applies – the court "shall instruct" the jury as follows:

> . . . . it is the policy of this state to make an audio and visual recording of a custodial interrogation of a person suspected of committing a felony and the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case.

These sections were enacted with a delayed effective date: "The treatment of sections 968.073 and 972.115 of the statutes first applies to custodial interrogations . . .conducted on January 1, 2007." Section 51, 2005 Wisconsin Act 60.

The recording requirement applies only to statements that are the result of interrogation, not to a suspect's "unsolicited comment about his presence in the area . . . not provoked by any statement or action" on the part of police. State v. Banks, 2010 WI App 107, 328 Wis.2d 107, 790 N.W.2d 526. The Wisconsin rule regarding recording interrogation would apply to an interview by Milwaukee police officers of a defendant in a St. Paul, Minnesota, jail, not the Minnesota rule — which requires suppression of unrecorded statements. State v. Townsend, 2008 WI App 20, 307 Wis.2d 694, 746 N.W.2d 493. [However, the rule did not apply in Townsend because the interrogation occurred in 2004 and the Wisconsin rule applies beginning with interrogations conducted on January 1, 2007.]

In State v. Jerrell C. J., 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, the Wisconsin Supreme Court mandated, under its supervisory power, that "custodial interrogations of juveniles . . . be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." ¶3, ¶58. Though phrased as a mandate to police agencies, the court characterized its holding as a rule of evidence, that "would render the unrecorded interrogations and any resultant written confession inadmissible as evidence in court." ¶47. Jerrell C. J. did not discuss a cautionary instruction as an alternative remedy. The Jerrell C. J. rule is codified in § 938.195 and § 938.31 and specifies suppression of the statement as the remedy.

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One of the exceptions to the recording requirement is that "exigent public safety circumstances existed that prevented the making of" a recording or "rendered the making of such a recording unfeasible." § 972.155(2)(a)5. The same exception applies to the recording requirement for juvenile cases, which was found to apply in State v. Joel I.-N., 2014 WI App 119, 358 Wis.2d 404, 856 N.W.2d 654. Also see, State v. Dionicia M., 2010 WI App 134, 329 Wis.2d 524, 791 N.W.2d 236, where the court found that recording was feasible and that the juvenile code suppression remedy applies.

State v. Moore, 2015 WI 54, 363 Wis.2d 376, 864 N.W.2d 827, involved the arrest and interrogation of a 15 year old who was later waived to adult court where his trial took place. The court considered which remedy applies in this situation: suppression under the juvenile code rule or a jury instruction under § 972.155. The court did not resolve that question:

> Resolving the question of remedy here would yield no satisfactory answer. Fortunately, that is not necessary on the facts of this case. . . No four members of this court agree on the proper remedy for violation of § 938.195 in the criminal prosecution of a person under the age of 17, but a majority does agree that any error in admitting Moore's confession was harmless in this case. ¶¶90, 91.

Voluntariness and Trustworthiness

This instruction is to be used when evidence has been admitted relating to a statement made by the defendant. For the statement to have been admissible, the court will have determined that it was obtained in compliance with Miranda and that it was voluntarily made. The statement must still be evaluated by the jury in terms of its "trustworthiness," that is, its weight and credibility. Jackson v. Denno, 378 U.S. 368 (1964); Lego v. Twomey, 404 U.S. 477 (1972); State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 258-65, 133 N.W.2d 753 (1965); State v. Verhasselt, 83 Wis.2d 647, 659, 266 N.W.2d 342 (1978). The jury should also consider whether the statement was accurately related at trial by the witness. State v. Miller, 35, Wis.2d 454, 465, 151 N.W.2d 157 (1967).

While the determination of "voluntariness" is for the court and the evaluation of "trustworthiness" is for the jury, it is obvious that many of the same facts are relevant to both determinations. However, the legal issues are different. The court will have determined that the statement is admissible by the time the jury hears it and the jury is not reviewing or duplicating that legal finding. Rather, the jury is to determine the weight and credibility of the statement. While case law has referred to this as "trustworthiness," the Committee concluded that there was little value in retaining the use of that term in the instruction and it was eliminated in the 1999 revision in favor of referring simply to "weight."

A variety of special circumstances may affect the weight, or trustworthiness, of a statement. In cases where a statement is of great importance, the court may find it appropriate to add to the standard instruction to recognize the special circumstances. However, the substance of the addition would be to advise the jury to consider the special circumstances in terms of the weight the statement is to be accorded. Instructions formerly published, which highlighted certain special circumstances, have been withdrawn (Wis JI-Criminal 182, 185, and 187, all copyright 1962).

The Wisconsin Supreme Court has discussed a variety of special circumstances in terms of their effect on the trustworthiness of confessions:

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- whether the statement was preceded or followed by other statements. Lang v. State, 178 Wis. 114, 189 N.W. 558 (1922); State v. Schlise, 86 Wis.2d 26, 271 N.W.2d 619 (1979).

- whether the defendant suffered from mental incapacity. State v. Bronston, 7 Wis.2d 627, 97 N.W.2d 504 (1959).

- whether the defendant was so intoxicated that his statement was not credible. State v. Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978).

- whether the statement was signed by the defendant (not relevant). Kutchera v. State, 69 Wis.2d 834, 230 N.W.2d 750 (1975).

- whether the statement was corroborated by other evidence in the case. Larson v. State, 86 Wis.2d 187, 271 N.W.2d 647 (1978); Schultz v. State, 82 Wis.2d 737, 264 N.W.2d 245 (1978); Triplett v. State, 65 Wis.2d 365, 222 N.W.2d 689 (1974); Holt v. State, 17 Wis.2d 468, 117 N.W.2d 626 (1962).

In State v. Bannister, 2007 WI 86, 302 Wis.2d 158, 734 N.W.2d 892, the Wisconsin Supreme Court held that the common law rule that a confession must be corroborated is a rule of sufficiency of the evidence, not admissibility. It is sufficient that there is corroboration of any "significant fact" — it need not establish elements of the crime or relate to a particular fact within the confession. Under the facts of the Bannister case, evidence of morphine in the blood of Michael Wolk was evidence that he used morphine, and corroborated Bannister's confession that he delivered morphine to Wolk.

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182 CONFESSIONS AND ADMISSIONS: SERIES OF STATEMENTS

185 CONFESSIONS AND ADMISSIONS: MENTAL CONDITION OF DEFENDANT IN ISSUE

187 CONFESSIONS AND ADMISSIONS: EVIDENCE THAT DEFENDANT DID NOT UNDERSTAND INTERROGATOR

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 182, 185, and 187 were originally published in 1962. They were withdrawn by the Committee in 1982. This version was republished without change in 1991 and 2000.

The special circumstances dealt with by the above instructions are now to be addressed by Wis JI-Criminal 180. See the Comment to that instruction for further discussion.

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190 WEIGHT OF EVIDENCE

The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses.

COMMENT

Wis JI-Criminal 190 was originally published in 1962 and revised in 1983 and 1991. This revision was approved by the Committee in August 1999 and was intended to make the instruction more understandable without changing its meaning.

For discussion of the relationship between the number of witnesses and the credibility of testimony, see Banks v. State, 51 Wis.2d 145, 153, 186 N.W.2d 250 (1971), and Ruiz v. State, 75 Wis.2d 230, 234, 249 N.W.2d 277 (1977). Also see O'Brien v. Chicago & N.W. Ry. Co., 92 Wis.2d 340, 66 N.W.2d 363 (1896); Hack v. State, 141 Wis. 346, 354, 124 N.W. 492 (1910).

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195 JUROR'S KNOWLEDGE

In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.

COMMENT

Wis JI-Criminal 195 and comment were originally published in 1962 and revised in 1983. This version was republished without change in 1992 and 2000.

Solberg v. Robbins Lumber Co., 147 Wis. 259, 133 N.W. 28 (1911), is the source of the rule that individual knowledge, observation, and experience might be used.

The application of common knowledge and of individual observation and experience to the evidence for the purpose of drawing inferences was approved in DeKeuster v. Green Bay W. R.R. Co., 264 Wis. 476, 59 N.W.2d 452 (1953); McCarthy v. Weber, 265 Wis. 70, 60 N.W.2d 716 (1953); Coenen v. Van Handel, 269 Wis. 6, 68 N.W.2d 435 (1955).

This is an optional instruction. It is a proper supplemental instruction and was so used in Solberg, supra.

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200 EXPERT[1] OPINION TESTIMONY: GENERAL

Ordinarily, a witness may testify only about facts. However, a witness with specialized knowledge in a particular field may give an opinion in that field.

In determining the weight to give to this opinion, you should consider:

- the qualifications and credibility of the witness;
- the facts upon which the opinion is based; and
- the reasons given for the opinion.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion.

[CONTINUE WITH THE FOLLOWING IF EXPERTS HAVE GIVEN CONFLICTING TESTIMONY.]

[In resolving conflicts in opinion testimony, weigh the different opinions against each other. Also consider the qualifications and credibility of the witnesses and the facts supporting their opinions.]

COMMENT

Wis JI-Criminal 200 was originally published in 1976 and revised in 1983, 1991, 2000, 2011, and 2012. This revision was approved by the Committee in October 2018; it eliminated the use of the word "expert" in the text of the instruction.

The 2019 revision modified the text to eliminate the use of the word "expert" to describe the witness. The change was made to address the risk of "judicial vouching," a term used to describe the idea that the jury may give undue deference to the opinion of a witness whom the judge has called an "expert." The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see, the report of the National Commission on Forensic Science titled "Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

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The last paragraph of this instruction includes material formerly published separately at Wis JI-Criminal 200A.

In 2011, Wisconsin adopted the so-called Daubert standard for determining the admissibility of expert testimony. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). 2011 Wisconsin Act 2 renumbered § 907.02 as § 907.02(1) and amended it to read:

907.02(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.]

As amended, § 907.02 tracks Federal Rule of Evidence 702.

See Wis. Stat. §§ 907.02 - 907.07 and the commentary found at 59 Wis.2d R204 - R219. Also see Wis JI-Criminal 205, **EXPERT TESTIMONY – HYPOTHETICAL QUESTION**.

The key issues with regard to expert testimony are whether the witness is in fact qualified as an expert "by knowledge, skill, experience, training, or education" and whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." See § 907.02. If proposed testimony satisfies these criteria, it will usually be admissible and may be excluded only if it would be superfluous or a waste of time. See Judicial Council Committee's Note to § 907.02, 59 Wis.2d R207. The leading cases discussing general rules relating to expert testimony are Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 203 N.W.2d 135 (1973); Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969); Andersen v. Andersen, 8 Wis.2d 278, 283, 99 N.W.2d 190, 193 (1959); Anderson v. Eggert, 234 Wis. 348, 361, 291 N.W. 365, 371 (1940).

Before § 907.02 was amended by 2011 Wisconsin Act 2, the criteria by which an expert's qualifications are judged were broad enough to include persons who have become an expert by virtue of experience as opposed to academic training. Whether this will continue to be the case after Act 2 is open to question. Wisconsin law referred to these persons as "lay experts":

A lay expert is one whose expertise or special competence derives from experience working in the field of endeavor rather than from studies or diploma. Indeed, experience in some cases may be the most important element of expertise. 'Whether an opinion of a witness may be given depends upon his superior knowledge in the area in which the precise question lies.'

Black v. General Electric Co., 89 Wis.2d 195, 212, 278 N.W.2d 224 (1979).

When lay witnesses qualify as experts under these guidelines, their opinion is admissible as an expert opinion, to be treated just as the opinions of scientists, engineers, doctors, and other "true experts" are treated. In those cases, the standard instruction on expert testimony (Wis JI-Criminal 200) is appropriate, not the instruction for opinion testimony by a lay witness (see Wis JI-Criminal 201).

Examples of the types of persons recognized as "lay experts" are:

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– a drug user on the identification of a substance as LSD. State v. Johnson, 54 Wis.2d 561, 564-67, 196 N.W.2d 717 (1972); and

– a foreman of a concrete construction crew on the capacity of fresh concrete to cause burns. Netzel v. State Sand & Gravel Co., 51 Wis.2d 1, 7-8, 186 N.W.2d 258 (1971).

Also see Luke v. Northwestern National Casualty Co., 31 Wis.2d 530, 535-36, 143 N.W.2d 482 (1966), and cases cited therein.

In criminal cases, considerable attention has been directed to the testimony of psychiatrists or psychologists and on testimony relating to polygraph tests. Decisions have precluded expert testimony in the following areas: polygraph tests, State v. Dean, 103 Wis.2d 228, 307 N.W.2d 628 (1981); expert opinion testimony on the defendant's capacity to form the intent to kill, Steele v. State, 97 Wis.2d 72, 294 N.W.2d 2 (1980), State v. Dalton, 98 Wis.2d 725, 298 N.W.2d 398 (1980), Muench v. Israel, 715 F.2d 1124 (7th Cir. 1983); psychiatric opinion on the appropriate degree of criminal responsibility, Roe v. State, 95 Wis.2d 226, 290 N.W.2d 291 (1980); and psychiatric testimony on the credibility of a witness, State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (1980).

1. Although the 2019 revision removed the word "expert" from the text of the instruction (see discussion in the Comment preceding this footnote) it was retained in the title so that the instruction would continue to be easy to find. The Committee recommends that the title not be included in the written instructions that are provided to the jury.

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200A EXPERT TESTIMONY: MORE THAN ONE EXPERT

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 200A was withdrawn in 2000. Its substance was added to Wis JI-Criminal 200.

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201 OPINION OF A NONEXPERT WITNESS

Ordinarily, a witness may testify only about facts. However, in this case (name of witness) was allowed to give an opinion as to (identify the subject on which an opinion was given).[1]

In determining the weight you give to this opinion, you should consider the witness' opportunity to observe what happened and the extent to which the opinion is based on that observation.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by the opinion of any witness.

COMMENT

Wis JI-Criminal 201 was originally published in 1983 and revised in 1991 and 2000. This revision was approved by the Committee in July 2011; it added reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is for the situation where a nonexpert witness is allowed to testify in the form of an opinion. § 907.01.

Section 907.01 was amended by 2011 Wisconsin Act 2 to read as follows:

> 907.01 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

Subsections (1) and (2) were part of the prior statute; subsection (3) was created by Act 2.

The rule is in accord with prior Wisconsin case law which had rejected the proposition that lay witnesses may testify only to fact, not opinion. See Bennett v. State, 54 Wis.2d 727, 735, 196 N.W.2d 704 (1972), and York v. State, 45 Wis.2d 550, 173 N.W.2d 693 (1970).

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The requirement that admissible opinion be "rationally based on the perception of the witness" is the standard rule that a witness' testimony must be based on first hand knowledge or observation. The second requirement, that the opinion be "helpful to a clear understanding of his testimony or the determination of a fact in issue," allows the trial judge to exclude evidence that will not assist the jury. See the Committee Notes to Rule 907.01, 59 Wis.2d R205-06 (1973). The third requirement, that the opinion not be based on "scientific, technical, or other specialized knowledge" under § 907.02 is apparently intended to emphasize that opinion by a lay witness is not the same as "expert opinion testimony."

The primary reason for the rule allowing nonexperts to sometimes testify in opinion form is the recognition of the difficulty that witnesses may have in presenting certain testimony in a way that technically does not involve an "opinion." For example, it would be extremely difficult, if not impossible, for a witness to describe how fast a car was traveling if the witness was not allowed to express it in terms of an opinion as to the car's speed. The expression of this testimony in terms of miles per hour is technically an opinion but is permitted in order to save time and to assure that the jury gets relevant information in a useful form. The testimony is not actually being admitted as a conclusion that the jury is to accept as true. Rather, it is being admitted to show the impression or conclusion reached by the witness, which may be helpful to the jury in understanding the facts. Practical concerns require that it be allowed to be phrased in terms of an opinion. This concept was explained in connection with a "lay opinion" on sanity in Duthey v. State:

> A little consideration of the reasons why anything more than evidence of the actual physical facts observed by the witness should be allowed to be stated would greatly aid courts and counsel in this field. First, it is obvious that one not an expert can no more aid the jury by an expert opinion as to sanity than any other fact or condition. If all the physical facts can be stated, the jury are as competent to form an opinion as the witness, and their province ought not to be invaded. But all experience teaches the frequent if not general impossibility of stating all things which the eye and ear note in an interview with another, the wildness of the eye, the incoherence of the ideas in speech, hurried or erratic manner, and the like. Ordinarily it is impossible for the narrator either to remember the specific acts, words, and gestures or to adequately describe them so as to convey to his hearer their significance to the real information desired, namely, the mental state, without stating that they were excited, incoherent, unreasonable, unusual, or the like, all of which is but statement of conclusion or opinion. Hence the rule has grown that the ordinary observer may so state his impression of his interview. Courts have seemingly been unable to express verbal distinctions between the mere statement by a witness as to the impression on his mind of certain acts narrated as fully as he can and a declaration of opinion generally that the person was sane or insane, and a direct inquiry as to such opinion is now sanctioned by the weight of authority, with which the expressions in our own decisions agree. The subject received lucid treatment at the pen of Harlan, J., in Conn. Mut. L. Ins. Co. v. Lathrop, 111 U.S. 612, 4 Sup. Ct. 533, which case presents ideal illustration of the best manner of propounding the proper question to the witness. After a conversation had been narrated, the manner described as agitated, face flushed and expressionless, the question was propounded, substantially. What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed? This was fully approved. We do not mean that there would be error in the direct inquiry as to witness's opinion as to the person's sanity, based, of course, on what he saw and heard; but the form quoted above is much more likely to prevent confusion in the mind of the witness and to impress the jury with the true significance of the testimony.

Duthey v. State, 131 Wis. 178, 186-87, 111 N.W. 222 (1907).

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1. Wisconsin cases have recognized the admissibility of opinion testimony by nonexpert witnesses on the following subjects:

a. Bodily appearance or condition — Heiting v. Heiting, 64 Wis.2d 110, 218 N.W.2d 334 (1974); Freven v. Brenner, 19 Wis.2d 445, 114 N.W.2d 334 (1962); Stanislawski v. Metropolitan Life Ins. Co., 231 Wis. 572, 286 N.W. 10 (1939).

b. Collective facts — State v. Ewald, 63 Wis.2d 165, 216 N.W.2d 213 (1974); York v. State, 45 Wis.2d 550, 173 N.W.2d 693 (1970).

c. Condition of land/real property — Konrad v. State, 4 Wis.2d 532, 91 N.W.2d 203 (1958).

d. Crop damage estimate — Watry v. Hiltgen, 16 Wis. 543 (1863).

e. Defective condition of machinery — S.F. Bowser v. Savidusky, 154 Wis. 76, 142 N.W. 182 (1913).

f. Drunkenness — State v. Bailey, 54 Wis.2d 679, 196 N.W.2d 664 (1972); Milwaukee v. Bichel, 35 Wis.2d 66, 150 N.W.2d 419 (1967).

g. Identification — State v. Schmack, 264 Wis. 333, 58 N.W.2d 668 (1953).

h. Mental condition — Cramer v. Theda Clark Memorial Hospital, 45 Wis.2d 147, 172 N.W.2d 427 (1969); In re Will of Zych, 251 Wis. 108, 28 N.W.2d 316 (1947).

i. Pain and suffering — Drexler v. All-American Life & Casualty Co., 72 Wis.2d 420, 241 N.W.2d 401 (1976); Heiting v. Heiting, 64 Wis.2d 110, 218 N.W.2d.334 (1974); Werner v. Chicago & Northwestern Ry. Co., 105 Wis. 300, 81 N.W. 416 (1900).

j. Presence of blood — Cullen v. State, 26 Wis.2d 652, 133 N.W.2d 284 (1965), cert. denied, 382 U.S. 863, 86 S.Ct. 126, 15 L.Ed.2d 101 (1965).

k. Room temperature — Leopold v. VanKirk, 29 Wis. 548 (1872).

l. Speed — Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); Bennett v. State, 54 Wis.2d 727, 196 N.W.2d 704 (1972); Pagel v. Kees, 23 Wis. 462, 127 N.W.2d 816 (1964).

m. Estimating time of day — Schwantes v. State, 127 Wis. 160, 106 N.W. 237 (1906).

n. Value of personal property — Wilbersheid v. Wilbersheid, 77 Wis.2d 40, 252 N.W.2d 76 (1977); Estate of Ensz v. Brown Ins. Agency, Inc., 66 Wis.2d 193, 223 N.W.2d 903 (1974); Trible v. Tower Ins. Co., 43 Wis.2d 172, 168 N.W.2d 148 (1969).

o. Value of real estate — Clay v. Bradley, 74 Wis.2d 153, 246 N.W.2d 142 (1976); Genge v. City of Baraboo, 72 Wis.2d 531, 241 N.W.2d 183 (1976); Trible v. Tower Ins. Co., 43 Wis.2d 172, 168 N.W.2d 148 (1969).

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p. Weather conditions/temperature — Curtis v. Chicago & Northwestern Ry. Co., 18 Wis. 327 (1864).

q. Opinion formed by judge about writing's authenticity — Jax v. Jax, 73 Wis.2d 572, 243 N.W.2d 831. (1976).

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202 POLYGRAPH EVIDENCE

[INSTRUCTION WITHDRAWN]

COMMENT

Originally published in 1976, Wis JI-Criminal 202 was withdrawn by the Committee in 1981. It was republished without change in 1991. The comment was updated in 1999. This revision updated the comment and was approved by the Committee in October 2008.

Polygraph results are not admissible.

The instruction was withdrawn due to the decision of the Wisconsin Supreme Court in State v. Dean, 103 Wis.2d 228, 307 N.W.2d 628 (1981). In Dean, the court reviewed the admission-by-stipulation rule announced in State v. Stanislawski, 62 Wis.2d 730, 216 N.W.2d 8 (1974), and concluded that the rule should no longer be followed.

> To conclude, we have not undertaken to evaluate the reliability of the polygraph. We recognize today, as we did in Stanislawski, that the science and art of polygraphy have advanced and that the polygraph has a degree of validity and reliability. We are, nevertheless, not persuaded that the reliability of the polygraph is such as to permit unconditional admission of the evidence. Our analysis of and our experience with the Stanislawski rule lead us instead to conclude that the Stanislawski conditions are not operating satisfactorily to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do.
>
> The Stanislawski rule which appeared in 1974 to be a reasonable compromise between unconditional admission of and unconditional rejection of polygraph evidence does not appear at this time to be the satisfactory compromise, and we decline to continue to permit the admission of polygraph evidence pursuant to the rule set forth in Stanislawski.
>
> We also reject the alternative of awaiting continued refinement of the Stanislawski rule on a case-by-case method. Adequate standards have not developed in the seven years since Stanislawski to guide the trial courts in exercising their discretion in the admission of polygraph evidence. The lack of such standards heightens our concern that the burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have.
>
> For the reasons we have set forth, we hold that hereafter it is error for the trial court to admit polygraph evidence unless a Stanislawski stipulation was executed on or before September 1, 1981.

103 Wis.2d 228, 278-279.

In State v. Ramey, 121 Wis.2d 177, 359 N.W.2d 177 (Ct. App. 1984), the court affirmed that Dean established a rule of blanket exclusion of polygraph evidence on public policy grounds, regardless of the possibility that a stronger showing of polygraph accuracy might be made than was made in the Dean case.

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In United States v. Scheffer, 118 S. Ct. 1261 (1998), the United States Supreme Court upheld Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court martial proceedings. The defendant's claim that the flat rule of exclusion deprived him of his constitutional right to present a defense was rejected. The court found that the lack of scientific consensus concerning the reliability of polygraphs means that individual jurisdictions "may reasonably reach differing conclusions as to whether polygraph evidence should be admitted" and therefore, Rule 707's rule of per se exclusion "is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." Wisconsin has, by virtue of the Dean decision, the equivalent of the rule reviewed in Scheffer.

Offers to take a polygraph test may be admissible.

Appellate decisions recognize a distinction between evidence of polygraph test results and evidence of an offer to take or a refusal to take a polygraph test. The cases suggest that evidence of the latter may be admissible as relevant to credibility despite the Dean rule. The distinction was first noted in State v. Hoffman, 106 Wis.2d 185, 316 N.W.2d 143 (Ct. App. 1982), but the court found that even if the distinction existed, the defendant had failed to make a sufficient showing to justify cross-examining a witness about whether he had offered to take a polygraph test. The issue was revisited in State v. Wofford, 202 Wis.2d 523, 551 N.W.2d 46 (Ct. App. 1996), where the court held that allowing a witness to refer to a polygraph test and the test results was error. The court concluded that the testimony was not within the potential exception mentioned in Hoffman.

In State v. Santana-Lopez, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918, the defendant told the police that he would take a polygraph and DNA tests. The trial court excluded this evidence. The court of appeals reversed and remanded for the trial court to reconsider the ruling under the following guidelines:

> [A]n offer to take a polygraph test and an offer to undergo a DNA analysis are relevant to the state of mind of the person making the offer – so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible. Simply put, an offer to undergo DNA testing, like an offer to take a polygraph examination, may reflect a consciousness of innocence. 2004 WI App 122 ¶4.

In State v. Pfaff, 2004 WI App 31, 269 Wis. 2d 786, 676 N.W.2d 562, the court acknowledged the potential admissibility of an offer to take a polygraph test, but found that the defendant's agreement to submit to a polygraph test at the request of his attorney did not constitute an "offer:"

> ¶30 . . . We hold that when the defense attorney plants the seed for the idea of offering to take a polygraph test, the probative value of such an offer as "consciousness of innocence" is diminished to a level where it no longer assists on the question of guilt or innocence. Instead, it takes the jury into the realm of speculation and likely confusion.

Principles applicable to polygraph testing are equally applicable to voice stress analysis.

> "Principles applicable to polygraph testing are equally applicable to voice stress analysis. See Wis. Stat. § 905.065(1); 7 Daniel D. Blinka, Wisconsin Evidence § 5065.1 (2d ed. 2001) (concluding that there is little reason to treat the forms of honesty testing mentioned in § 905.065 differently, 'at least under the present state of the scientific art). We see no reason at this time to treat these two methods of "honesty testing" differently.'"

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State v. Davis, 2008 WI 71, ¶20.

Voluntary statements that are not "closely associated" with voice stress analysis may be admissible.

"When a statement is so closely associated with the voice stress analysis that the analysis and statement are one event rather than two events, the statement must be suppressed." State v. Davis, 2008 WI 71, ¶2, citing State v. Greer, 2003 WI App 112, ¶¶9-12, 265 Wis.2d 463, 666 N.W.2d 518.

In Davis, the certification from the Court of Appeals and the state urged the court to consider why all statements should not be admissible [if voluntary] regardless of any connection to a voice stress analysis test. Test results, and expert opinion interpreting those results, would be inadmissible. But any statement of the defendant would be admissible subject to regular voluntariness and Miranda analysis. The Davis decision concluded the answer was simple: Rule 905.065 precludes it. The rule was created by Chapter 319, Laws of 1979 [effective date: May 18, 1980] but had not been a major factor in the polygraph decisions that preceded Davis.

905.065 Honesty Testing Devices

This statute creates a privilege for persons subject to an honesty test:

(2) GENERAL RULE OF THE PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.

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205 EXPERT[1] TESTIMONY: HYPOTHETICAL QUESTIONS

During the trial, a witness was told to assume certain facts and then was asked for an opinion based upon that assumption. This is called a hypothetical question.

The opinion does not establish the truth of the facts upon which it is based. Consider the opinion only if you believe the assumed facts upon which it is based have been proved. If you find that the facts stated in the hypothetical question have not been proved, then the opinion based on those facts should not be given any weight.

COMMENT

Wis JI-Criminal 205 was originally published in 1976 and revised in 1983, 1991 and 2000. This revision was approved by the Committee in October 2018; it eliminated the word "expert" from the text of the instruction.

The 2019 revision modified the text to eliminate the use of the word "expert" to describe the witness. The change was made to address the risk of "judicial vouching," a term used to describe the idea that the jury may give undue deference to the opinion of a witness whom the judge has called an "expert." The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see, the report of the National Commission on Forensic Science titled "Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

The instruction is based on McGaw v. Wassmann, 263 Wis. 486, 492 N.W.2d 920 (1953), citing Will of McGovern, 241 Wis. 99, 3 N.W.2d 717 (1942), and on Baxter v. Chicago & NW Ry., 104 Wis. 307, 330, 80 N.W. 644 (1899). See Ford v. State, 206 Wis. 138, 140, 238 N.W. 865 (1931).

Section 907.05, Wisconsin Rules of Evidence, permits experts to testify to their opinions without disclosure of underlying facts unless the judge requires otherwise. Questions calling for expert opinion, therefore, need not be in hypothetical form.

A hypothetical question may be based on facts not yet in evidence. However, at the conclusion of testimony every assumption in which the hypothetical question is based must be supported by facts in evidence. Novitzke v. State, 92 Wis.2d 302, 307 N.W.2d 904 (1979). Also see Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969).

For a case approving the use of a hypothetical question, see State v. Owen, 202 Wis.2d 620, 636-38, 551 N.W.2d 50 (Ct. App. 1996).

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1. Although the 2019 revision removed the word "expert" from the text of the instruction (see discussion in the Comment preceding this footnote) it was retained in the title so that the instruction would continue to be easy to find. The Committee recommends that the title not be included in the written instructions that are provided to the jury.

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215 OBJECTIONS OF COUNSEL: EVIDENCE RECEIVED OVER OBJECTION

[INSTRUCTION RENUMBERED]

COMMENT

Wis JI-Criminal 215 was renumbered Wis JI-Criminal 148 in 2000.

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220 EVIDENCE: LIMITED PURPOSE: STATEMENT OF CODEFENDANT

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 220 was originally published in 1962. It was withdrawn by the Committee in 1969. This withdrawal note was approved by the Committee in 1985 and was revised in August 1987. It was republished without change in Release No. 28—12/91. This revision added the paragraph discussing Gray v. Maryland and was approved by the Committee in June 1998.

Wis JI-Criminal 220, Evidence: Limited Purpose: Statement of Codefendant, was originally intended for use at the joint trial of codefendants where the statement of one defendant was admitted into evidence. Its purpose was to caution that the statement was to be considered only against the defendant who made it.

Wis JI-Criminal 220 was withdrawn in 1968 after the U.S. Supreme Court decided Bruton v. United States, 391 U.S. 123 (1968). Bruton dealt with the following situation: (1) there is a joint trial of two or more codefendants; (2) the out-of-court statement of one defendant is introduced against him; (3) that defendant does not take the stand at trial; (4) the statement implicates a codefendant; and (5) the statement is not directly admissible against the codefendant under the rules of evidence. Bruton was concerned about the "spillover effect" of admitting the statement: even though admitted only against the person who made it, the statement implicates the codefendant and is likely to have a serious prejudicial effect. Because the codefendant is unable to cross-examine the maker of the statement, his right to confrontation is violated. The use of a cautionary jury instruction was not enough to cure the error because a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinary assumption that the jury will be able to follow faithfully its instructions could not be applied. 391 U.S. 123, 136. Severance of defendants was identified as the required remedy because cautionary instructions alone could not overcome the prejudicial effect. Wis. Stat. § 971.12(3), was enacted in 1970 to codify the Bruton rule, requiring severance in any case where the district attorney "intends to use the statement of a codefendant which implicates another defendant in the crime charged."

Severance may not be required if all references to the other defendant are removed from the codefendant's statement. "[I]f references to codefendants are 'effectively' excised and the jury is properly instructed, no Bruton violation occurs." Cranmore v. State, 85 Wis.2d 722, 746, 271 N.W.2d 402 (Ct. App. 1978). Also see Pohl v. State, 96 Wis.2d 290, 291 N.W.2d 554 (1980). "Excising" also satisfies § 971.12(3) because the excised statement "no longer 'implicates another defendant' and therefore does not fall within the prohibition of the statute." Cranmore, 85 Wis.2d 722, 747-48.

Editing or "redacting" the codefendant's confession was approved by the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200 (1987). The Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." The decision reversed the holding of the U.S. Court of Appeals for the Sixth Circuit which

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had ruled the confession inadmissible because the defendant was linked to it by other evidence. Thus, the Court rejected the "evidentiary linkage" or "contextual implication" approach to Bruton questions adopted by some courts.

Both Richardson and Cranmore emphasize the need for a limiting instruction when an edited or "redacted" confession of a nontestifying codefendant is admitted at a joint trial. See Wis JI-Criminal 221 for an instruction for the case where the confession does not explicitly name the defendant.

In Gray v. Maryland, 118 S. Ct. 1151 (1998), the court reviewed a redacted confession: wherever the defendant's name appeared in the codefendant's confession, a blank space or the word "deleted" was substituted. The court found that this was insufficient to satisfy the interests addressed by Bruton. Richardson v. Marsh was distinguished on the ground that the statement in that case was edited to remove all reference to anyone other than the codefendant who made the statement. The court concluded:

> Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the Bruton Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indication of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result.

Two other situations present variations on the Bruton problem. One was a short-lived exception for "interlocking" confessions. The other is an exception for cases where the codefendant's confession, which is hearsay, is admitted for a nonhearsay purpose.

(1) Interlocking Confessions: Parker v. Randolph

In 1979, the U.S. Supreme Court decided Parker v. Randolph, 442 U.S. 62 (1979), holding (in a plurality decision) that "interlocking confessions" do not implicate the Bruton rule. When each defendant has confessed, the jury's exposure to the codefendant's confession cannot have the "devastating effect" that was the concern in Bruton. Proper limiting instructions are required: "A crucial assumption underlying that system [the jury system] is that juries will follow the instructions given them by the trial judge." 442 U.S. 62, 73.

Though Parker v. Randolph was only a plurality decision, it has been adopted by the Wisconsin Court of Appeals. See State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Denny, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). Denny also held that because interlocking confessions present an exception to Bruton, they present an exception to the § 971.12(3) which was intended to codify Bruton. 120 Wis.2d 614, 620.

In Cruz v. New York, 481 U.S. 186 (1987), the Court repudiated the plurality decision of Parker v. Randolph. Cruz held that the codefendant's confession is not admissible even if it is closely parallelled by (that is, "interlocks" with) a confession of the defendant. The Court rejected the reasoning of the Parker v. Randolph plurality that the "devastating effect" is absent in the interlocking confession case. Rather, Cruz says the devastating effect is even greater in such cases, requiring full application of the Bruton rule.

No published decision of a Wisconsin appellate court has revisited the interlocking confessions issue since Cruz was decided.

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(2) Nonhearsay Purpose: Tennessee v. Street

In Tennessee v. Street, 471 U.S. 409 (1985), the U.S. Supreme Court held that the Bruton rule was not implicated by the introduction of an accomplice's confession for a nonhearsay purpose — rebutting the defendant's testimony that his own confession was coercively derived from the accomplice's statement. The statement was not introduced to prove what happened at the murder scene, so it raises no confrontation clause concerns.

The Court said the only similarity to Bruton is that the statement could have been misused by the jury. This danger can be effectively addressed by a limiting instruction directing the jury to consider the statement for the nonhearsay purpose only.

Wis JI-Criminal 220B, Law Note, discusses Tennessee v. Street.

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220A CAUTIONARY INSTRUCTION: INTERLOCKING CONFESSIONS

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 220A was originally approved by the Committee in November 1985. It was withdrawn in August 1987. It was republished without change in Release No. 28—12/91. This revision updated the comment and was approved by the Committee in June 1998.

In Parker v. Randolph, 442 U.S. 62, (1969), a plurality of the U.S. Supreme Court held that "interlocking confessions" do not implicate the mandatory severance rule of Bruton v. United States, 391 U.S. 123 (1968). For a discussion of Bruton and the cases that followed it, see the Withdrawal Note to Wis JI-Criminal 220.

Though Parker v. Randolph was only a plurality decision, it was adopted by the Wisconsin Court of Appeals. See State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Denny, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). Denny also held that because interlocking confessions present an exception to Bruton, they present an exception to § 971.12(3) which was intended to codify Bruton. 120 Wis.2d 614, 620.

In Cruz v. New York, 481 U.S. 186 (1987), the Court repudiated the plurality decision of Parker v. Randolph. Cruz held that the codefendant's confession is not admissible even if it is closely parallelled by (that is, "interlocks" with) a confession of the defendant. The Court rejected the reasoning of the Parker v. Randolph plurality that the "devastating effect" is absent in the interlocking confession case. Rather, Cruz says the devastating effect is even greater in such cases, requiring full application of the Bruton rule.

No published decision of a Wisconsin appellate court has revisited the interlocking confessions issue since Cruz was decided.

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220B LAW NOTE: STATEMENT OF ACCOMPLICE ADMITTED FOR NONHEARSAY PURPOSE

COMMENT

Wis JI-Criminal 220B was originally published in 1985 and revised in 1987. This version was republished without change in Release No. 28—12/91.

This note discusses the use of an accomplice's confession in the trial of a single defendant, where evidence of that confession is admitted for a nonhearsay purpose. In Tennessee v. Street, 471 U.S. 409 (1985), the U.S. Supreme Court held that the mandatory severance rule of Bruton v. United States, 391 U.S. 123 (1968), was not implicated where the confession of an accomplice was admitted for a nonhearsay purpose. See the discussion of Bruton in Wis JI-Criminal 220, Withdrawal Note.

In Street, the confession of an accomplice was introduced to rebut the defendant's testimony that his own statement was coercively derived from the accomplice's statement. The Court held that since the statement was not introduced to prove what happened at the murder scene (that would have been a "hearsay purpose" — to prove the truth of the statement), admission raises no confrontation clause concerns.

The Court said the only similarity to Bruton is that the statement could have been misused by the jury. This danger can be effectively addressed by a limiting instruction directing the jury to consider the statement for the nonhearsay purpose only.

The Wisconsin appellate courts have not yet adopted the Tennessee v. Street rule. Although the situation comes close to implicating the constitutional concerns of Bruton, the basis for the decision was the distinction between hearsay and nonhearsay purpose. Whether such a distinction will be adopted in Wisconsin is not known at the time this Note was prepared. On one hand, the Wisconsin courts have tended to follow the United States Supreme Court's lead on issues like this. See, for example, State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (1983), adopting the plurality decision in Parker v. Randolph, 442 U.S. 62 (1969), on the interlocking confessions issue. Parker v. Randolph's exception for interlocking confessions has been repudiated. See Cruz v. New York, 481 U.S. 186 (1987), discussed at Wis JI-Criminal 220A, Withdrawn. On the other hand, it is difficult to admit evidence for a limited purpose and, more importantly, difficult to assure that a juror will use the evidence only for the limited purpose. (See sample instruction below.) This may lead Wisconsin trial and appellate courts to use considerable caution in the Tennessee v. Street situation by making a careful evaluation of the probative value of the evidence compared to its unfairly prejudicial effect. See § 904.03, Wis. Rules of Evidence.

Limiting instructions are inherently difficult. One for this situation is especially difficult to evaluate in a general form. An instruction adapted for the facts of Tennessee v. Street might read as follows:

> Evidence has been received of a statement made out-of-court by Clifford Peele.
>
> This evidence is to be considered only for the purpose of rebutting the defendant's testimony that his own confession was a coerced copy of Peele's statements.
>
> It must not be considered as proof of the facts contained in the statement.

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221 STATEMENT OF CODEFENDANT: STATEMENT DOES NOT MENTION DEFENDANT[1]

Evidence has been received of a statement made by defendant (name). It may be used only in considering whether defendant (name) is guilty or not guilty. It must not be used or considered in any way against defendant (name other defendant).

COMMENT

Wis JI-Criminal 221 was approved by the Committee in August 1987 and republished without change in Release No. 28—12/91. The comment was updated in 1999. It was republished without substantive change in 2000.

1. This instruction is intended for the situation reviewed by the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200 (1987). The case involved application of the so-called Bruton rule (see discussion in the Comment to JI-220) to a case where the following facts are present: (1) there is a joint trial of two or more codefendants; (2) the statement of one defendant is introduced against him; (3) that defendant does not take the stand at trial; and (4) the statement does not expressly mention the other defendant.

The Court in Richardson held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." (Emphasis added.) The decision reversed the holding of the U.S. Court of Appeals for the Sixth Circuit which had ruled the confession inadmissible because the defendant was linked to it by other evidence. Thus, the Court rejected the "evidentiary linkage" or "contextual implication" approach to Bruton questions adopted by some courts.

The Richardson decision appears to be consistent with Wisconsin law: "[I]f reference to codefendants are 'effectively' excised and the jury is properly instructed, no Bruton violation occurs." (Emphasis added.) Cranmore v. State, 85 Wis.2d 722, 746, 271 N.W.2d 402 (Ct. App. 1978).

In Gray v. Maryland, 118 S. Ct. 1151 (1998), the Court reviewed a redacted confession: wherever the defendant's name appeared in the codefendant's confession, a blank space or the word "deleted" was substituted. The Court found that this was insufficient to satisfy the interests addressed by Bruton. Richardson v. Marsh was distinguished on the ground that the statement in that case was edited to remove all reference to anyone other than the codefendant who made the statement. The Court concluded:

> Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special

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prejudice that the Bruton Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indication of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result.

While edited (or "redacted" or "excised") confessions present an exception to Bruton's mandatory severance rule, trial courts retain the discretionary power under § 971.12(3) to order separate trials or "provide whatever other relief justice requires" if "it appears that a defendant or the state is prejudiced by a joinder of crimes or defendants." Where a joint trial "would be unduly prejudicial . . . the interests of administrative efficiency must yield to the mandates of due process." Haldane v. State, 85 Wis.2d 182, 189, 270 N.W.2d 75 (1978). Two such situations are cases involving antagonistic defenses, Jung v. State, 32 Wis.2d 541, 145 N.W.2d 684 (1966), Lampkins v. State, 51 Wis.2d 564, 187 N.W.2d 164 (1971), or where an entire line of evidence relevant to the liability of only one defendant may be treated as evidence against all the defendants by the trier of fact simply because the defendants are tried jointly. State v. Nutley, 24 Wis.2d 527, 129 N.W.2d 155 (1964).

In a joint trial where the statement of one defendant does not explicitly refer to a codefendant, the trial court retains its usual discretionary power to disallow the statement if their probative value is outweighed by the danger of unfair prejudice. § 904.03, Wis. Rules of Evidence.

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222 JOINT TRIAL: EVIDENCE ADMISSIBLE AS TO ONE DEFENDANT ONLY

Evidence has been received relating to (describe evidence). It may be used only in considering whether defendant (name) is guilty or not guilty. It must not be used or considered in any way against defendant (name other defendant).

COMMENT

Wis JI-Criminal 222 was originally published in 1994 and was republished without substantive change in 2000.

This instruction is intended for the case where a "single line of evidence" is admitted during the joint trial of codefendants. This is evidence admissible against one defendant but not the other. An alternative to ordering separate trials in such cases is to give a cautionary instruction. When evidence is admitted for a limited purpose, a limiting instruction must be given upon request. § 901.06.

In State v. Patricia A. M., 168 Wis.2d 724, 484 N.W.2d 380 (Ct. App. 1992), the court of appeals reversed a conviction because a required cautionary instruction was not given. The case involved the joint trial of codefendants; evidence admissible only as to one defendant was allowed. The court of appeals held that the limiting instruction required by State v. DiMaggio, 49 Wis.2d 565 (1971), should have been given. The Wisconsin Supreme Court reversed, holding that the disputed evidence was admissible as to both defendants, thus avoiding the issue whether a cautionary instruction was necessary. 176 Wis.2d 542, 500 N.W.2d 289 (1993).

DiMaggio approached the issue from the standpoint of reviewing a trial court's refusal to order separate trials for codefendants. One defendant claimed the trial judge should have severed his case when evidence was admitted that related only to one defendant. The court affirmed the trial court's refusal to do so, indicating that the trial court gave a cautionary instruction which was an adequate substitute for severance. The court of appeals decision in Patricia A. M. stated that such an instruction must be given even in the absence of a request since it is the trial judge's duty to follow up once the severance motion was denied. Since the Wisconsin Supreme Court found that the evidence in Patricia A. M. was admissible as to both defendants, it was not necessary for the court to address the necessity or effectiveness of a jury instruction. The Committee concluded that DiMaggio was still a viable decision and drafted this instruction for use in the "single line of evidence" case.

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225 INSTRUCTING ON A "PRESUMED FACT" THAT IS AN ELEMENT OF THE CRIME — § 903.03(3)

Evidence has been received that: (here identify the "basic facts")[1] _____

_____.

If you are satisfied beyond a reasonable doubt that (state the basic facts) _____, you may find from this evidence alone that (identify the "presumed facts")[2] _____, but you are not required to do so. You are the sole judges of the facts, and you must not find that the defendant (state the presumed fact) unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.[3]

COMMENT

Wis JI-Criminal 225 was originally published in 1987. The list of statutes beginning on page 3 was amended in February 1989 and January 1990. The instruction was republished without substantive change in 2000.

This instruction is intended to provide a framework for instructing the jury on "presumptions" in criminal cases as required by § 903.03. Most of the commonly used "presumptions" and "prima facie cases" are covered by either separate instructions on the specific evidentiary device (see, for example, JI-230 relating to a blood alcohol test) or parts of the uniform instruction for the crime to which the evidentiary device relates (see, for example, Wis JI-Criminal 1468, **ISSUE OF WORTHLESS CHECK**). The text of § 903.03 appears after note 3.

The need for an instruction arises when the legislature or the courts recognize that a certain fact or set of facts should be accorded "prima facie" or "presumptive" effect in proving the existence of other facts. For example, § 943.24(3)(a) provides that "proof that, at the time of issuance, the person did not have an account with the drawee" is "prima facie evidence that the person at the time he or she issued the check or other order for the payment of money, intended it should not be paid." The statutes refer to these evidentiary devices in a variety of ways, but the Committee has concluded that they should all be treated in the same way — as permissive inferences. An attempt to list all statutes in the Criminal Code that recognize "presumptions" or "prima facie" cases follows at the end of this comment.

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Discussions of "presumptions" can become exceedingly complex. But understanding their impact in jury instructions in Wisconsin criminal cases can be simplified if one remembers that they only point out certain inferences that jurors are free to make but which jurors are not required to make. "Presumptions" cannot be employed to undercut the basic requirements that all facts necessary to constitute the crime (the "elements") be established beyond a reasonable doubt. Given that the effect of the "presumption" and the "prima facie case" is to create a "permissive inference," the Committee concluded that the words "presumption," "prima facie," or "inference," or their variations, should not be used in instructing the jury.

Two limitations on presenting these evidentiary devices to the jury should be noted. First, where the presumed fact is an element of the crime, the "presumption" cannot be submitted to the jury unless the evidence, as a whole, would allow the jury to be satisfied beyond a reasonable doubt that the presumed fact exists. See § 903.03(2). The presumption alone cannot justify submitting the case to the jury if the evidence as a whole is not sufficient.

Second, no inference or presumption may be submitted in a particular case unless, based on the facts of that case, the presumed fact is "more likely than not" to follow from the basic fact. This is the test set forth by the United States Supreme Court in County Court of Ulster County v. Allen, 442 U.S. 140 (1979). The Court held that if a statutory "presumption" creates a permissive inference (which is what "presumptions" and "prima facie cases" do in Wisconsin — see § 903.03(1)), defendants cannot challenge its constitutionality "on its face" by referring to hypothetical situations. Its validity may, however, be challenged as applied to the facts of a particular case. The test is whether ". . . there is a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." 442 U.S. 140, 165, citing Tot v. United States, 319 U.S. 463, 467 (1943), and Leary v. United States, 395 U.S. 6, 36 (1969). Ulster County involved a statutory "presumption" that anyone present in a car was in possession of weapons found in the car. Under the circumstances of that case (three adult males with a 16-year-old girl and guns in her purse), the Court found the "presumption" was validly submitted to the jury. If the facts had been different, involving a defendant who was a hitchhiker, for example, it would have been error to submit the "presumption" to the jury — under those facts, it could not be said that the presumed fact (possession of the gun) was "more likely than not to flow from" the basic fact (presence in the automobile).

1. The "basic facts" are those which give rise to the "presumption" or "prima facie case." In the issue of worthless check example, evidence that the defendant did not have an account with the bank on which the check is drawn is evidence of the "basic facts" which give rise to the "presumption" that the defendant intended the check not be paid.

2. The "presumed fact" is the fact that results from the application of the "presumption" or "prima facie case." In the issue of worthless checks example, "intent that the check not be paid" is the "presumed fact" which may be found from the proof of the basic fact: no account with the bank on which the check is drawn.

3. Applying the suggested instruction to the worthless check example would result in the following:

> Evidence has been received that the defendant did not have an account with the bank on which the check was drawn.

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If you are satisfied beyond a reasonable doubt that the defendant did not have an account with the bank on which the check was drawn, you may find from this evidence alone that the defendant intended the check not be paid, but you are not required to do so. You are the sole judges of the facts, and you must not find the defendant intended the check not be paid unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.

Section 903.03 of the Wisconsin Rules of Evidence sets forth rules relating to presumptions in criminal cases.

903.03 Presumptions in criminal cases. (1) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Criminal Code Statutes Using
"Presumptions" or "Prima Facie" Cases

Statute	Title	Evidentiary Device
940.19(6)*	Battery	"A rebuttable presumption..."[a]
940.225(6)**	Sexual Assault	"...shall not be presumed..."[b]
941.36(2)	Fraudulent Tapping of Electric Wires or Gas or Water Meters or Pipes	"...is presumptive evidence ..."
943.20(1)(b)	Theft by Employee or Bailee	"...is prima facie evidence of..."

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943.21(2), (2m)	Fraud on Hotel or Restaurant Keeper	"...prima facie evidence...is shown by..."; "...constitutes prima facie evidence of..."
943.24(3)	Issue of Worthless Checks	"...is prima facie evidence that..."
943.25(3)	Transfer of Encumbered Property	"It is prima facie evidence..."
943.37(3)***	Alteration of Property Identification Marks	"...is prima facie evidence of..."[c]
943.41(3)(a), (b) & (e), (4)(a) & (b)	Financial Transaction Card Crimes	"...is prima facie evidence..."
(5)(a), (6)(d)	" "	"...shall be presumed..."
943.455(2)	Theft of Commercial Mobile Service	"The intent required ... may be inferred ..."
943.46(2) (a), (d)-(g)	Theft of Cable Television Service	"The intent required ... may be inferred ..."
943.50(2)	Retail Theft	"...is evidence of..."
943.61(3)	Theft of Library Material	"...is evidence of..."
945.05(2)	Dealing in Gambling Devices	"...is prima facie evidence of..."
946.42(3)(e)	Escape	"...is prima facie evidence of ..."
948.02(6)****	Sexual Assault of a Child	"...shall not be presumed incapable of ..."
948.13(3)	Child Sex Offender Working with Children	"...is prima facie evidence that ..."
948.22(4)	Failure to Support	"...is prima facie evidence of..."
948.62(2)	Receiving Stolen Property From a Child	"...is prima facie evidence that..."

* The implementation of this presumption was discussed in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988).

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** This section does not actually create the same sort of evidentiary device as found in the other statutes. Rather, it is intended to state a rule of substantive law: that a person may be prosecuted for the sexual assault of his or her spouse.

*** In State v. Hamilton, 146 Wis.2d 426, 432 N.W.2d 108 (1988), the court found that the word "similar" in subsec. (3) "can be understood in different ways by reasonable people and that the statute is therefore ambiguous." The court then went on to define it: ". . . within the context of sec. 943.37(3), items must be comparable, substantially alike or capable of standing in the place of the other before they are similar."

**** This section does not actually create the same sort of evidentiary device as found in the other statutes. Rather, it is intended to state a rule of substantive law: that a person may be prosecuted for the sexual assault of his or her spouse.

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230 PRIMA FACIE EFFECT OF A TEST RESULT SHOWING AN ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE: OFFENSES INVOLVING "UNDER THE INFLUENCE" — § 885.235(1g)(c)

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[1]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[2] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[3] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[4]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device.

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However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

COMMENT

Wis JI-Criminal 230 was originally published in 1962 and was revised in 1974, 1982, 1985, 1993, 1994, 1999, and 2004. This revision was approved by the Committee in June 2005.

The text of this instruction is incorporated into most substantive offense instructions to which it may apply.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. As to alcohol test results generally, see Wis JI-Criminal 2600, Section VII.

1. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII., B.

2. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

3. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., C.

4. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., D.

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232 EVIDENCE OF A TEST RESULT SHOWING AN ALCOHOL CONCENTRATION OF 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS: OFFENSES INVOLVING "UNDER THE INFLUENCE" — § 885.235(1g)(b)

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[1]

WHERE TEST RESULTS SHOWING 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law provides that an analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time of the test may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that a person was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding a blood-alcohol test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.[2]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[3]

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[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

COMMENT

Wis JI-Criminal 232 was originally published in 1962 and was revised in 1974, 1980, 1982, 1985, 1993, 1994, 1999, and 2004. This revision corrected a typographical error.

This instruction is cross-referenced in the instructions for operating while intoxicated offenses.

This revision reflects the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. Act 30 changed § 885.235(1g)(b) to refer to the range of 0.04 to 0.08. That section provides that results in this range are relevant evidence on the issue of being "under the influence" but are not to be given any prima facie effect. The change applies to all offenses committed on or after September 30, 2003.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of JI 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. As to alcohol test results generally, see Wis JI-Criminal 2600, Section VII.

1. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII., B.

2. Section 885.235(1g)(b) provides that test results in the 0.04-0.08 range are relevant evidence on the issue of being "under the influence" but are not to be given any prima facie effect.

3. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., D.

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234 BLOOD-ALCOHOL CURVE

Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant (had a prohibited alcohol concentration) (was under the influence) at the time of the alleged (driving) (operating). Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 234 was originally published in 1993 and revised in 1999. This revision was approved by the Committee in 2003.

This paragraph should be added to the instruction for the offense when there is evidence of an issue relating to the "blood alcohol curve." The text of this instruction has been part of the instructions for individual drunk driving offenses since 1982. It was first published as a freestanding instruction in 1993.

The presence of a prohibited alcohol concentration at the time of operation is the significant issue. The relevance of a test result showing a prohibited alcohol concentration at some time after operation will vary, depending on many factors, including the person's physical condition, what the person had to eat, what the person drank, the length of time over which the drinks were consumed, etc. The problem of the so-called blood-alcohol curve is discussed in State v. Vick, 104 Wis.2d 678, 312 N.W.2d 489 (1981).

Vick presented a situation where the defendant claimed his blood was absorbing alcohol at the time he was arrested and that therefore the blood alcohol concentration had not reached the prohibited level at the time of driving but only reached that level later at the time of the test. If the evidence in a case presents this problem, the instruction on the prima facie effect of test results may not be appropriate since there may be no "rational connection" between the alcohol concentration at the time of the test and a prohibited alcohol

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concentration at the time of driving. (See Ulster Co. v. Allen, 442 U.S. 140 (1979), for a discussion of the "rational connection" requirement when instructing the jury on statutory presumptions.)

The Committee concluded that where there is a problem with the "blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it "prima facie effect."

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235 REFUSAL OF DEFENDANT TO FURNISH SAMPLE FOR ALCOHOL TEST

Testimony has been received that the defendant refused to furnish a (breath) (urine) sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving to it the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 235 was originally published in 1962. The comment was updated in 1982, 1983, 1985, and 2004. Nonsubstantive editorial changes were made in 1992 and 2000. This revision was approved by the Committee in October 2018; it removed the reference to "blood" in the text and added to the Comment.

The 2018 revision removed reference to a blood test in light of recent decisions from the United States and Wisconsin Supreme Courts. In Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016), the court held that it is unconstitutional to make it a crime to refuse a warrantless blood test after being lawfully arrested for OWI – where exigent circumstances were not shown. However, the court also stated:

> "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them." 136 S.Ct. 2160, 2185-86.

In State v. Dalton, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, the defendant was subjected to a warrantless blood draw that was justified by exigent circumstances. The Wisconsin Supreme Court held that a trial court erred by expressly relying on the defendant's refusal to consent to the blood draw to increase his sentence within the allowed statutory range:

> Dalton was criminally punished for exercising his constitutional right. Established case law indicates that this is impermissible. ¶61.
>
> . . . the circuit court violated Birchfield by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant. ¶67.

Neither Birchfield nor Dalton holds that commenting on a blood test refusal is improper, but the Committee decided to remove reference to a blood test from the text of the instruction to avoid possible issues as this area of the law continues to develop.

NOTE: In State v. Hawley, 2014 AP 1113-CR, the Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court for a "final resolution" whether implied consent applies to blood draws of unconscious individuals. The certification is being held in abeyance pending the decision of the U.S. Supreme Court in Mitchell v. Wisconsin, U.S. Case No. 18-6210, where the issue presented is "whether a

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statute authorizing a blood draw from an unconscious motorist provides an exception to the 4th Amendment warrant requirement." Oral argument in Mitchell was held April 23, 2019.

In State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980), the court of appeals reaffirmed that evidence of a defendant's refusal to take a chemical test was relevant and constitutionally admissible in a drunk driving prosecution. "A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to taking an alternative test." 98 Wis.2d 663, 668-69. The evidence being relevant and there being no right to refuse to take a test, the court held there was no rationale for prohibiting comment on the refusal.

In State v. Lemberger, 2017 WI 39, 369 Wis.2d 224, 880 N.W.2d 183, the Wisconsin Supreme Court rejected a claim that trial counsel provided ineffective assistance in failing to challenge the prosecutor's comment on Lemberger's refusal to take a breath test:

> Thus, the law was settled at the time of Lemberger's trial that, upon his lawful arrest for drunk driving, Lemberger had no constitutional or statutory right to refuse to take the breathalyzer test and that the state could comment at trial on Lemberger's improper refusal to take the test. ¶29.

The court also noted that the decision in Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016), confirmed that persons lawfully arrested for drunk driving have no right to refuse a breath test. ¶34.

The defendant's explanation for the refusal is also admissible. Since the relevance of the refusal is that it tends to indicate a consciousness of guilt,

> [t]he corollary of that rule is that any evidence that tends to rebut or diminish the force of that permissible inference is also relevant, for it tends to make less probable the fact of intoxication – a fact of consequence in this action, and, therefore, equally admissible. Thus, evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test.

State v. Bolstad, 124 Wis.2d 576, 585-86, 370 N.W.2d 576 (1985).

For a more complete discussion of the case law on this topic, see Wis JI-Criminal 2600 Introductory Comment at Sec. VII., F.

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237 ALCOHOL CONCENTRATION CHART

A chart showing estimated alcohol concentrations has been received in evidence and may be considered in arriving at a verdict. This chart is prepared by the Department of Transportation and shows estimated concentrations of alcohol as determined by comparing the number of drinks consumed with the weight of the person who consumed them. The chart has a formula for determining the amount of alcohol "burned up" over time by the drinker.

The estimates in the chart are based on estimates of the results under average circumstances. The actual alcohol concentration in any particular case will depend on many factors, including the metabolic rate of the person, which is the rate at which the body burns up alcohol, the actual alcohol content of the drinks, the amount of food in the person's stomach, and other factors.

This evidence was received for the purpose of helping you make your decision, if it does help you. You are not bound by this evidence. You should carefully consider the evidence along with all the other evidence in the case, giving to it just such weight as you decide it is entitled to receive.

COMMENT

Wis JI-Criminal 237 was approved by the Committee in March 1985 and was republished without substantive change in 1992 and 2000.

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The 1994 revision of this instruction deleted the reference to "blood" alcohol concentration. The current versions of the Department of Transportation charts are titled "Alcohol Chart."

In State v. Hinz, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984), the Wisconsin Court of Appeals held it was error to exclude the DOT-published chart relating Blood Alcohol Concentration (BAC) to the number of drinks consumed, adjusted for body weight. The court compared the BAC chart to the standard stopping distance chart and found no reason for treating the two differently.

The court further noted the standard civil jury instruction for the stopping distance chart and stated, "[w]e perceive no reason why the correlative limitations of the blood alcohol chart should not be explained to the jury in the same manner." 121 Wis.2d 282, 288. The civil instruction referred to in Hinz has been withdrawn. See the note at Wis JI-Civil 255.

The court in Hinz further listed what the "correlative limitations" are for the BAC chart: "Blood alcohol content may vary from the chart's estimate because of metabolic rate, the actual alcohol content of the drinks consumed, the amount of food in the stomach, and other factors." 121 Wis.2d 282, 286.

Hinz seems to assume that the actual chart will go to the jury, as opposed to there being only testimony, based on the chart, about what the defendant's BAC probably was. Wis JI-Criminal 237 is based on the Hinz decision.

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245 TESTIMONY OF ACCOMPLICES

You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

COMMENT

Wis JI-Criminal 245 was originally published in 1962 and was revised in 1983 and 1992. This revision was approved by the Committee in January 2000.

The 1999 revision involved a substantial rewriting of the former instruction, based in part on instruction 3.22, Federal Criminal Jury Instructions of the Seventh Circuit (West, 1980). The revision was intended to make the instruction more understandable without changing the meaning.

When this instruction is used, it should be given immediately after the general instruction on credibility of witnesses, see Wis JI-Criminal 300.

In cases where the accomplice has been granted immunity or other concessions, see Wis JI-Criminal 246. In State v. Nerison, the court of appeals had reversed Nerison's conviction because the trial testimony of two accomplices "was so indelibly and irreparably tainted by the state's actions in securing it that its admission violated Nerison's due process rights." The court of appeals found that the state had "crossed the line" in bargaining with the accomplices for specific testimony. 130 Wis.2d 313, 387 N.W.2d 128 (Ct. App. 1986). The Wisconsin Supreme Court reversed, holding that the due process line referred to by the court of appeals was not crossed due to the presence of corroborating evidence of guilt and the fact that all the traditional due process safeguards were made available: full disclosure of the state's agreement with the accomplices, cross-examination of the witnesses, and a specific jury instruction on the credibility of the accomplices. 136 Wis.2d 37, 401 N.W.2d 1 (1987). The Nerison court did not explicitly require a cautionary instruction in all cases, but giving an instruction should be carefully considered, given the court's emphasis on an instruction as one of the three important safeguards.

Other Wisconsin cases that discuss instructions on accomplice testimony have been concerned with whether it was error to fail to give an instruction. Most cases have found there to be no error, sometimes because the witness was not actually an accomplice, see Cheney v. State, 44 Wis.2d 454, 174 N.W.2d 1

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(1969), or because the testimony of the accomplice was not uncorroborated, see Cheney, supra, Bizzle v. State, 65 Wis.2d 730, 233 N.W.2d 577 (1974), and State v. Linse, 93 Wis.2d 163, 286 N.W.2d 554 (1980). But see Abaly v. State, 163 Wis. 609, 158 N.W. 308 (1916), where the court held it was prejudicial error to refuse to give an accomplice testimony instruction.

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246 TESTIMONY OF A WITNESS GRANTED IMMUNITY OR OTHER CONCESSIONS

You have heard testimony from (name of witness) who has received [immunity] [concessions].

["Immunity" means that (name of witness)'s testimony and evidence derived from that testimony cannot be used in a later criminal prosecution against (name of witness).]

[(Describe concessions).]

This witness, like any other witness, may be prosecuted for testifying falsely.

You should consider whether receiving [immunity] [concessions] affected the testimony and give the testimony the weight you believe it is entitled to receive.

COMMENT

Wis JI-Criminal 246 was originally published in 1983 and was revised in 1992. This revision was approved by the Committee in January 2000.

The 1999 revision expanded the instruction to cover other concessions that may have been extended to a witness in addition to or instead of a formal grant of immunity. The other concessions might involve agreements by the state not to charge (see State v. Jones, 217 Wis.2d 57, 576 N.W.2d 580 (Ct. App. 1998), to reduce or dismiss other charges, to agree to a recommended sentence, etc. Because there may be a dispute about whether concessions were actually granted, the Committee recommends this instruction be used in this form only where there is no dispute about the existence and nature of the concessions.

An earlier version of this instruction (© 1983) described "transactional immunity": the immunity grant meant that the witness could not be prosecuted for involvement in any crime about which the witness testified. The Wisconsin immunity statutes were amended by 1989 Wisconsin Act 122 (effective date: January 31, 1990) to provide that all immunity grants are for "use immunity." For example, § 972.085 provides as follows:

> 972.085 Immunity; use standard. Immunity from criminal or forfeiture prosecution under ss. 13.35, 17.16(7), 77.61(12), 93.17, 111.07(2)(b), 128.16, 133.15, 139.20, 139.39(5), 195.048, 196.48, 551.56(3), 553.55(3), 601.62(5), 767.47(4), 767.65(21), 776.23, 885.15, 885.24,

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885.25(2), 891.39(2), 968.26, 972.08(1) and 979.07(1), provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.

The original version of this instruction was labeled "optional." The Wisconsin Supreme Court has held it is not error to refuse to give a special instruction on the testimony of a witness who has been granted immunity, provided that the jury was aware of the immunity grant and was given the instruction on credibility of witnesses. See Linse v. State, 93 Wis.2d 163, 168, 286 N.W.2d 554 (1980), and Loveday v. State, 74 Wis.2d 503, 520-21, 247 N.W.2d 116 (1976).

A more recent case, however, indicated that where an immunity grant or other concessions have been made to a witness, a cautionary instruction is an important part of the due process safeguards to which a defendant is entitled. In State v. Nerison, the court of appeals had reversed Nerison's conviction because the trial testimony of two accomplices "was so indelibly and irreparably tainted by the state's actions in securing it that its admission violated Nerison's due process rights." The court of appeals found that the state had "crossed the line" in bargaining with the accomplices for specific testimony. 130 Wis.2d 313, 387 N.W.2d 128 (Ct. App. 1986). The Wisconsin Supreme Court reversed, holding that the due process line referred to by the court of appeals was not crossed due to the presence of corroborating evidence of guilt and the fact that all the traditional due process safeguards were made available: full disclosure of the state's agreement with the accomplices, cross-examination of the witnesses, and a specific jury instruction on the credibility of the accomplices. 136 Wis.2d 37, 401 N.W.2d 1 (1987).

The court in Nerison did not explicitly require a specific cautionary instruction in all cases. But given the emphasis on an instruction as one of three important safeguards, the Committee concluded in 1991 that it was best to remove the "optional" designation from this instruction.

This instruction is drafted in neutral terms so that it could be applied to a witness called by either the state or the defendant. The concerns discussed in Nerison, supra, are directed at state witnesses and do not necessarily apply to a defense witness. See State v. Miller, 231 Wis.2d 447, 605 N.W.2d 567 (Ct. App. 1999).

Immunity may be granted only upon the motion of the prosecutor. The court cannot grant immunity sua sponte; the defendant does not have the right to compel the state to request immunity for a defense witness. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975); State v. Evers, 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991).

While the defendant has no reciprocal right to immunity grants for defense witnesses, the rule is tempered by two considerations. First, the Wisconsin Supreme Court has noted that the prosecutor's duty is "'to seek justice, not merely to convict.' When the prosecutor is considering whether or not to make a motion for immunity, he should bear in mind this predominant objective of impartial justice, and not merely whether the evidence will be favorable to the prosecution. He should not hesitate to move for immunity solely on the basis that the testimony thus elicited might exonerate the defendant." Peters, supra, 70 Wis.2d 22, 41. Second, developments in other contexts suggest that a prosecutor's refusal to request immunity for a defense witness based solely on tactical considerations may violate due process. See

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McMorris v. Israel, 643 F.2d 458 (7th Cir. 1981), where, under Wisconsin's since-abandoned polygraph stipulation rule, it was held that a prosecutor must have valid, nontactical reasons for refusing to enter into a stipulation.

For a discussion of several issues relating to immunity grants, see SM-55.

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247 VERDICT AS TO DEFENDANT ONLY

There is evidence in the case which, if believed, indicates that more than one person was involved in the commission of the offense. The fact that the other person(s) is (are) not on trial is not material. You are to determine only whether the defendant, _____, is guilty or not guilty.

COMMENT

Wis JI-Criminal 247 and comment were originally published in September 1980, revised in 1983, and was republished without change in 1992 and 2000.

This instruction was prepared for use in cases where the testimony clearly indicates that more than one person was involved in the crime. The jury may speculate as to why only the defendant is on trial. This instruction advises the jury not to allow such speculation to affect its verdict.

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255 STATE NEED NOT PROVE EXACT DATE OF COMMISSION: SPECIFIC DATE ALLEGED

If you find that the offense charged was committed by the defendant, it is not necessary for the State to prove that the offense was committed on the precise date alleged in the (information) (complaint). If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient.

COMMENT

Wis JI-Criminal 255 was originally published in 1962. It was revised in 1983 and republished without change in 1991. It was revised in 1999 and was republished without change in 2000.

The 1998 revision made nonsubstantive editorial changes in the text and changed the title to indicate that this instruction is to be used only where the charging document alleges that the offense occurred on a specific date. For cases where the charge alleges that the offense occurred during a period of time, Wis JI-Criminal 255A should be used.

CAUTION: This instruction should not be used when evidence of more than one criminal act has been admitted in support of a single charge or where the evidence points to a particular hour or date of commission, and the defendant has produced evidence of an alibi. See Abaly v. State, 163 Wis. 609, 158 N.W. 308 (1916), and Eaton v. State, 252 Wis. 420, 31 N.W.2d 618 (1947).

In Jensen v. State, 36 Wis. 598, 154 N.W.2d 769 (1967), the court held it was error to give this instruction in a case where there were two offenses in question which occurred very close to each other in time and where there was general testimony to the effect that the acts (of sexual intercourse) occurred several times. The court said the instruction "was designed for a fact situation in which one offense only is alleged, or where, if there are multiple offenses, there is absolutely no confusion in anyone's mind as to their separateness in time." 36 Wis.2d 598, 604-05.

In many cases, it will be necessary for the jury to agree that a particular act was committed by the defendant. The time the act was allegedly committed is one way to identify the particular act, but the legal issue is more one of jury agreement than "time of the offense." Regarding jury agreement when there is evidence of more than one criminal act, see Wis JI-Criminal 515.

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255A STATE NEED NOT PROVE EXACT DATE OF COMMISSION: PERIOD OF TIME ALLEGED

If you find that the offense charged was committed by the defendant, it is not necessary for the State to prove that the offense was committed on a specific date. If the evidence shows beyond a reasonable doubt that the offense was committed during the time period alleged in the (information) (complaint), that is sufficient.

COMMENT

Wis JI-Criminal 255A was originally published in 1999 and republished without substantive change in 2000.

This instruction is intended to be used where the charging document alleges that the offense occurred during a period of time. For cases where the charge alleges that the offense occurred on a specific date, Wis JI-Criminal 255 should be used.

This instruction was drafted in response to the decision in State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998), where the Wisconsin Supreme Court held that a trial court committed error in giving a revised version of Wis JI-Criminal 255 in a case where the charging document referred to a period of time rather than a specific date. The court concluded that the revised instruction was "internally inconsistent, falsely stated the law and misled the jury." 219 Wis.2d 65, 85.

In a case like Dodson, where the charging document refers to a period of time, it is sufficient that the jury be satisfied that the offense occurred at any point within that period of time. This instruction is intended simply to reinforce that rule for the jury. Use of Wis JI-Criminal 255, in its published form or with modification, is not necessary in that type of case. The Committee concluded that no reference to the dates is required; the general reference in the instruction referring to a finding that the offense occurred "at the time and place alleged in the (complaint) (information)" will be sufficient.

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260 TIME OF OFFENSE: WHERE STATE NOT REQUIRED TO ELECT
265 TIME OF OFFENSE: WHERE STATE HAS ELECTED

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 260 and 265 were originally published in 1962. They were withdrawn in 1983. An editorial correction was made in the comment in 1985. This version was republished without change in 1992. The comment was modified in 2000.

The standard instructions on "time of the offense" are Wis JI-Criminal 255 and 255A. They are suitable for all cases where the time of the offense is not in issue and where there is evidence of a single criminal act. For cases where the jury must unanimously agree on a particular criminal act and there has been evidence of more than one possible criminal act, Wis JI-Criminal 517 should be used.

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267 VENUE — § 971.19

[THIS INSTRUCTION IS TO BE GIVEN ONLY WHEN VENUE IS A CONTESTED ISSUE IN THE CASE. IT SHOULD BE SUBSTITUTED FOR THE "JURY DECISION" PARAGRAPHS IN THE OFFENSE INSTRUCTION.][1]

A criminal case is required to be tried in the county where the crime was committed. However,

[where two or more acts are required for the commission of any offense, the trial may be in any county in which any of such acts occurred.][2]

[where an offense is committed in or within one-fourth of a mile of the boundary of two or more counties, the trial may be in any of such counties.][3]

[where the offense has been committed in, or against a vehicle, the trial may be in any county through which the vehicle has passed or in the county where the travel began or ended.][4]

[if the act causing death is in one county and death occurs in another, the trial may be in either county.[5] (If neither location can be determined, the trial may be held in the county where the body was found.)][6]

[if the offense began outside the state but was completed within the state, the trial may be held in the county where the crime was completed.][7]

If you are satisfied beyond a reasonable doubt that the defendant committed the offense charged (or _____, a lesser included offense) and that[8]

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[one of the acts required for the commission of the offense was committed in _____ County,]

[the offense was committed on or within one-fourth of a mile of the boundary of _____ County,]

[the vehicle involved in this offense passed through _____ County or that the travel began or ended in _____ County,]

[(the act causing death or that the death itself occurred in _____ County) (that the body was found in _____ County),]

[the offense was completed in _____ County,]

you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 267 was originally published in 1979. The comment was revised in 1983, 1990, 2000, and 2006. This revision was approved by the Committee in October 2010; it involved editorial corrections to the text and updating the Comment.

Section 971.19(1) provides that criminal actions are to be tried in the county where the crime was committed except as otherwise provided in that section. This instruction deals with the generally applicable exceptions under subs. (2) through (6). The offense-specific exceptions in subs. (7) through (12) are not included in the instruction. The Committee concluded that the instruction need be given only when venue is contested and only when one of the exceptions under § 971.19 applies. In all other cases, the Committee believes the finding of venue is adequately covered by the standard verdict forms (Wis JI-Criminal 480 and ff.), which provide for a finding of guilty "as charged in the information."

Venue is not an element of the crime but rather it is a matter of procedure and designates the geographic division of the state in which the action is to be tried. Nevertheless, venue must be proved beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Venue may be established by circumstantial evidence; direct testimony is not required, Smazal, supra, 31 Wis.2d at 363.

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In State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12, the Court held that "[a] specific instruction on venue needs to be given only when venue is contested." ¶26. [Note 1 to Wis JI-Criminal 267 was cited with apparent approval.] Also see State v. Schultz, 2010 WI App 124, 329 Wis.2d 424, 791 N.W.2d 190.

Neither statute nor case law (other than Swinson) in Wisconsin specifically requires that the finding of venue be made by the jury. However, that it is the jury's function finds implicit support in a number of cases. See, for example, State v. Dombrowski, supra, Smazal v. State, supra, State v. Coates, 262 Wis. 469, 55 N.W.2d 353 (1952), Piper v. State, 202 Wis. 58, 231 N.W. 162 (1930), Kellar v. State, 174 Wis. 67, 182 N.W. 321 (1921), and Davis v. State, 134 Wis. 632, 115 N.W. 150 (1908).

The instruction provides for selecting from the alternatives provided in brackets. As adapted for a case involving the first bracketed alternative, the instruction would read as follows:

> A criminal case is required to be tried in the county where the crime was committed. However, where two or more acts are required for the commission of any offense, the trial may be in any county in which any of such acts occurred.
>
> If you are satisfied beyond a reasonable doubt that the defendant committed the offense charged and that one of the acts required for the commission of the offense was committed in _____ County, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty

For a discussion of probable cause sufficient to show venue under the general venue requirement in § 971.19(1), see State v. Anderson, 2005 WI 54, 280 Wis.2d 104, 695 N.W.2d 731.

For crimes committed in a "precinct" of a state prison, venue properly lies in the county in which the institution is located, see § 302.02. In such cases, it may be helpful to instruct the jury that they need not be concerned about the fact that the offense actually took place outside the county in which the court is located.

The issue of venue is different from the issue of the territorial jurisdiction of the state of Wisconsin over criminal conduct. The latter is addressed by § 939.03. See Wis JI-Criminal 268 LAW NOTE: JURISDICTION.

In State v. Jensen, 2010 WI 38, 324 Wis. 2d 586, 782 N.W.2d 415, the court held that the exception in sub. (12) applies to a prosecution begun before the exception was created.

1. The Committee concluded that the instruction need be given only when venue is contested and only when one of the exceptions under § 971.19 applies. In all other cases, the Committee believes the finding of venue is adequately covered by the standard verdict forms (Wis JI-Criminal 480 and ff.), which provide for a finding of guilty "as charged in the (information) (complaint)."

2. Section 971.19(2). Under this subsection, venue for a conspiracy case properly lies in any county where a member of the conspiracy performed an act which effected the object of the conspiracy. State v. Cavallari, 214 Wis.2d 42, 54-55, 571 N.W.2d 176 (Ct. App. 1997).

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Facts were found to be sufficient to establish venue under § 971.19(2) in a theft by fraud case in State v. Swinson, 2003 WI App 45, 261 Wis.2d 633, 660 N.W.2d 12.

3. Section 971.19(3).

4. Section 971.19(4).

5. Section 971.19(5).

6. Section 971.19(5). Read only if county where act or death occurred cannot be determined.

7. Section 971.19(6).

8. Select the alternative that matches the alternative selected above.

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268 LAW NOTE: JURISDICTION — § 939.03

Section 939.03 defines the scope of the state's territorial jurisdiction over crime. State v. Randle, 2002 WI App 116, ¶12, 252 Wis.2d 743, 647 N.W.2d 324.

"Territorial jurisdiction is an issue for the jury if it involves unresolved factual disputes; however, whether Wisconsin has jurisdiction under the law for a crime based on an undisputed set of facts is an issue of law for the circuit court." State v. Anderson, 2005 WI 54, at footnote 5, 280 Wis.2d 104, 695 N.W.2d 731. [Citing State v. Brown, 2003 WI App 34, ¶¶25-27, 260 Wis.2d 125, 659 N.W.2d 110.][1]

The decision in Anderson is consistent with the conclusions reflected in the previously published version of this Law Note:

> The Committee concluded that if the jurisdiction issue depends upon contested issues of fact, those issues are for the jury to determine, using the beyond a reasonable doubt standard. If the charging document does not properly allege that the crime was committed within the territorial jurisdiction of the state of Wisconsin, the trial court should grant a motion to dismiss. If there is a dispute about jurisdiction that presents a purely legal question, that is, whether the law confers jurisdiction over an undisputed factual situation, that question should be decided by the court. But if the charging document sufficiently alleges facts in support of jurisdiction and there is a dispute about those facts, the issue will be for the jury to decide.

Where jurisdiction is submitted to the jury, the Committee concluded that it can usually be accomplished under the standard verdict instructions which include the statement: "... as charged in the (information) (complaint)." See Wis JI-Criminal 480-494.

In cases involving the special circumstances addressed by § 939.03 — where some acts are committed outside the state — an instruction on venue as suggested in Wis JI-Criminal 267 ought to be sufficient to cover the territorial jurisdiction issue as well.[2]

One of those special circumstances is identified in § 939.03(1)(a), which requires that one of the constituent elements of an offense "takes place" in Wisconsin. The mental element of first degree intentional homicide is a constituent element under this statute and is shown to "take place" "upon proof that the defendant committed an act in Wisconsin manifesting an intent to kill." State v. Anderson, supra, 2005 WI 54, ¶3.

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COMMENT

Wis JI-Criminal 268 was originally published in 1990. The comment was updated in 1998 and it was republished without change in 2000. This revision was approved by the Committee in August 2005 and involved revising the text to reflect recent court decisions.

Before 2002, there was no direct case law authority in Wisconsin indicating that the issue of territorial jurisdiction is, like venue, a question for the jury and, if so, what the burden of persuasion is. That lack of authority has been partially addressed by the cases cited in the text above. Wisconsin's approach is consistent with what appears to be the majority rule — that the territorial jurisdiction issue is for the jury. For example, the Model Penal Code treats venue and jurisdiction as elements that must be proved beyond a reasonable doubt. §§ 1.12 and 1.13(a), Model Penal Code and Commentaries, American Law Institute (1985).

The Wisconsin court of appeals has held that "a crime involving a failure to act is committed at the place where the act is required to be performed." State v. Gantt, 201 Wis.2d 206, 548 N.W.2d 134 (Ct. App. 1996). The Gantt decision upheld the Wisconsin conviction for failure to pay child support where the order was entered in Wisconsin but both the parent and the child resided out of state.

1. Also see State v. Bratrud, 204 Wis.2d 445, 448-49, 555 N.W.2d 669 (Ct. App. 1996): "When the location of the 2 acts which form the basis for a criminal charge is in dispute and the information pleads that the acts occurred in the State of Wisconsin, subject matter jurisdiction depends upon a question of fact, to be determined by the jury or, in the case of a plea, by the trial court." Note that Bratrud involved a guilty plea, not a case where the jurisdiction issue was contested in the trial court. The court of appeals held that the jurisdiction issue was waived because the information to which the plea was entered alleged that the crime was committed in Wisconsin.

2. This conclusion was noted in State v. Brown, 2003 WI App 34, ¶10 and footnote 10, 260 Wis.2d 125, 659 N.W.2d 110, but was not relied on because the court found that an instruction was not required in that case. Note that the provisions of § 939.03 Jurisdiction of state over crime, are not an exact match for those relating to venue in § 971.19 Place of trial. That is, it appears that § 939.03 may establish jurisdiction in situations where § 971.19 may not establish venue.

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270 EVIDENCE AS TO DEFENDANT'S CHARACTER — § 904.04(1)(a)

Testimony has been received regarding the character of the defendant for _____.[1]

Consider this along with all the other evidence in arriving at your verdict, giving it the weight you believe it is fairly entitled to receive.

COMMENT

Wis JI-Criminal 270 was originally published in 1962 and revised in 1983, 1991, and 1998. It was republished without substantive change in 2000.

The 1998 revision substantially modified the text by eliminating references that tied the character evidence directly to the beyond a reasonable doubt standard. The Committee concluded that those references were unnecessary and more likely to be confusing to the jury than helpful.

This instruction is intended for use only when evidence of a defendant's "pertinent trait of character" has been admitted under § 904.04(1)(a). Evidence offered under this rule is presented for its circumstantial value: the defendant is trying to show that his or her character at the time of the alleged offense was such that it is unlikely that he or she committed the crime. Character evidence will have probative value only if it relates to a character trait that is relevant to the offense charged. Thus, the statute requires that the evidence be of a "pertinent" character trait.

When evidence of character is admissible, proof may be by testimony as to reputation or testimony in the form of an opinion. On cross-examination, inquiry is allowed into specific instances of conduct. (Sec. 904.05.)

Because the justification for the admission of character evidence is that a person of such character would be less likely to commit the crime charged, only evidence relating to the defendant's character before the crime was committed should be admissible. This will usually involve knowledge obtained or opinions formed prior to the alleged commission of the crime charged. The test would be one of basic relevance: Does the proffered evidence tend to establish the defendant's character at the time the alleged crime was committed?

1. The pertinent character trait should be identified in the blank provided in the instruction. Examples would be: "being peaceable and law-abiding" (where the charge involved assaultive behavior); "being honest and having integrity" (where the charge involved dishonesty or corruption); "always telling the truth" (where the charge involved fraud).

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Character Evidence Generally

This instruction is adapted from that which was approved in Niezorawski v. State, 131 Wis. 166, 177, 111 N.W. 250 (1907). In that case the court stated:

> . . . With reference to evidence of the good reputation of defendant the instructions requested were:
>
> > If you believe the testimony of the witness called who testified to the good reputation of the defendant as to his honesty and integrity, such testimony may be in itself sufficient to raise in your minds a reasonable doubt as to his guilt of the offense charged in the indictment, and if you entertain such doubt you must return a verdict of not guilty.
>
> The defendant had no more right to have this evidence separately pointed out by the court to the jury as such which may be in itself sufficient to raise a reasonable doubt than he would have to take any other item of evidence from which an inference favorable to the defendant might be raised and call it separately to the attention of the jury with this particular comment, almost suggestion. The charge of the court on this subject shows the proper way of presenting such matters to the jury by instruction. We quote it for precedent:
>
> > Testimony has been received as to the good reputation of the defendant for honesty and integrity previous to the time it is alleged he committed the offense charged in the indictment. Such testimony of good reputation should be considered by you in connection with all the other evidence in the case, and if after such consideration you entertain any reasonable doubt as to the guilt of the defendant, you must acquit him; but if from all the evidence in the case, including the testimony as to the good reputation of the defendant, you are satisfied of his guilt beyond a reasonable doubt, then it is immaterial what his reputation has heretofore been as to honesty and integrity.

The instruction requested in the Niezorawski case and found to be improper is similar to the so-called standing alone instruction that has been considered by several federal courts. The United States Court of Appeals for the Seventh Circuit has rejected the "standing alone" instruction for federal prosecutions. In United States v. Burke, 781 F.2d 1234 (7th Cir. 1985), the court overruled an earlier decision and rejected the uniform instruction for the circuit which had provided:

> You should consider character evidence together with and in the same manner as all the other evidence in the case. Character evidence alone may create a reasonable doubt of the defendant's guilt." (Pattern instruction 3.15, Federal Criminal Jury Instructions of the Seventh Circuit)

Burke rejected the instruction for several reasons:

(1) No evidence should be considered "standing alone."

(2) If any evidence is to be singled out, character evidence is the wrong kind. "It does not speak to the question whether the accused committed the crime. People of impeccable reputation may commit crimes, and when they are charged with crime the question is whether they did it, not whether they enjoy a high social standing. . . . Character evidence is a dispensation from the ordinary rules of evidence, and a curious dispensation it is. It aids exclusively the well-connected." 781 F.2d 1234, 1239.

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(3) Two U.S. Supreme Court decisions [Michelson v. United States, 335 U.S. 469 (1848); Edgington v. United States, 164 U.S. 361 (1896)] cited as supporting a "standing alone" instruction are distinguished: the usually-cited portions were either dictum or addressed to different issues.

The Burke case has a complete and interesting discussion of character evidence that helps to put the approach used in Wis JI-Criminal 270 in context. Its conclusion regarding the "standing alone" instruction is consistent with that of the majority of the federal circuits. See United States v. Pujana-Mena, 60 U.S.L.W. 2343, for a summary of how this issue is currently treated in the circuits and a complete discussion of the issue.

The general rules relating to the admissibility and method of proof of character are set forth in §§ 904.04 and 904.05. The general rule is that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." Section 904.04(1). The rationale behind the rule has been described as follows:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948).

In criminal cases, the rule of nonadmissibility applies to the prosecution's case-in-chief: the prosecution may not introduce evidence of the defendant's bad character for the purpose of showing that the defendant acted in conformity with that character in committing the crime charged. However, the defendant may introduce evidence of good character in any case. When this occurs, the prosecution may respond with evidence tending to rebut the defendant's evidence.

When evidence of character is admitted, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Section 904.05(1). Affirmative proof of character by reference to specific instances of conduct is allowed only where character is an essential element of a charge, claim, or defense. Section 904.05(2). Few, if any, crimes presently exist in Wisconsin where the character of the defendant is an essential element.

Evidence of other crimes or wrongs is not admissible to show the defendant's bad character but may be admissible for certain other purposes specified in § 904.04(2). See also Wis JI-Criminal 275.

Evidence of the character of the victim of a crime is admissible in the following situations: when offered by the defendant; when offered by the prosecution in rebuttal of character evidence offered by the defendant; and when offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor and the evidence is of a character trait of peacefulness. Section 904.04(1)(c). There is no standard instruction relating to evidence of the victim's character.

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With respect to evidence as to a witness' character, such evidence is limited to character for truth and veracity and may be introduced only after the witness' character for truthfulness has been attacked. See § 906.08 and Wis JI-Criminal 330.

In State v. Bedker, 148 Wis.2d 257, 410 N.W.2d 802 (1989), the court held that evidence that the defendant had never been convicted of a crime was not admissible to prove she was of law-abiding character. It is not reputation testimony or opinion. Further, "it does not follow from the fact that the person has never been convicted of a crime that the person is law-abiding. Lawless persons may avoid convictions." 149 Wis.2d 257, 269.

The admissibility of expert opinion testimony on a defendant's character trait of nonhostility and nonaggressiveness is discussed in State v. King, 75 Wis.2d 76, 248 N.W.2d 458 (1977).

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275 CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CONDUCT [REQUIRED IF REQUESTED][1] — § 904.04(2)(a)

Evidence Presented

Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial.

Specifically, evidence has been presented that the defendant (describe conduct). If you find that this conduct did occur, you should consider it only on the issue(s) of [CHOOSE ONLY THOSE THAT APPLY][2] (motive) (opportunity) (intent) (preparation or plan) (knowledge) (identity) (absence of mistake or accident) (context or background) (identify other issue).[3]

You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

Definitions

The evidence was received on the issue(s) of [CHOOSE ONLY THOSE THAT APPLY][4]

[motive, that is, whether the defendant has a reason to desire the result of the offense charged.][5]

[opportunity, that is, whether the defendant had the opportunity to commit the offense charged.]

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[Intent,[6] that is, whether the defendant acted with the state of mind that is required for the offense charged.]

[preparation or plan,[7] that is, whether the other conduct of the defendant was part of a design or scheme that led to the commission of the offense charged.]

[knowledge,[8] that is, whether the defendant was aware of facts that are required to make criminal the offense charged.]

[identity,[9] that is, whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as the one who committed the offense charged.]

[absence of mistake or accident,[10] that is, whether the defendant acted with the state of mind required for the offense charged.]

[context or background, that is, to provide a more complete presentation of the evidence relating to the offense charged.][11]

[describe other issue][12]

CONTINUE WITH THE FOLLOWING IN ALL CASES

You may consider this evidence only for the purpose(s) I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

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COMMENT

Wis JI-Criminal 275 was originally published in 1978 and revised in 1983, 1989, 1991, 2003, and 2016. The 2016 revision reorganized and updated the Comment, incorporating material that previously appeared in 275.1 which has been withdrawn. This revision was approved by the Committee in April 2018; it updated the Comment.

This instruction is for use where evidence of other crimes or other acts committed by the defendant is admitted for an acceptable purpose under § 904.04(2)(a). An instruction for use where prior convictions are admissible to prove character under § 904.04(2)(b)2. is provided in Wis JI-Criminal 276. A cautionary instruction for evidence of prior convictions admitted to impeach a defendant is provided in Wis JI-Criminal 327.

Section 904.04(2) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to create subd. (2)(b)1. which sets forth an exception to the general rule in § 904.04(2)(a) for specified offenses. See the discussion below at the "Greater Latitude" caption.

The rules relating to admissibility of "other acts" evidence do not apply to offenses offered as predicates for a Chapter 980 commitment. State v. Kaminski, 2009 WI App 175, 322 Wis.2d 653, 777 N.W.2d 654. Evidence offered to prove the "course of conduct" element of the crime of stalking is not subject to analysis as "other acts" evidence under § 904.04(2) because it is not offered to prove character. State v. Conner, 2009 WI App 143, ¶24, 321 Wis.2d 449, 775 N.W.2d 105. Affirmed on other grounds, State v. Conner, 2011 WI 8, 331 Wis.2d 352, 795 N.W.2d 750.

The admission of other acts evidence is one of the most commonly litigated issues in criminal cases. The decisions cited here, while numerous, are not intended to be a complete catalog of all cases dealing with other acts evidence.

Case Law Origins — Whitty v. State

The general prohibition on proving character is now found in a rule of evidence — § 904.04(2). But that rule had its origin in a decision of the Wisconsin Supreme Court: Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967), cert. denied, 390 U.S. 959 (1968) that was based on due process principles:

> ". . . the rule we adopt . . . is based upon the premise that the accused is entitled to a procedurally and evidentially fair trial . . ." 34 Wis.2d at 295.

> ". . . [when other acts evidence is admitted] it runs the danger . . . of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence." 34 Wis.2d at 297.

The references to "fair trial" seem clearly to invoke a due process basis for the rule — it is the Due Process Clause that insures the right to a fair trial.

The general rule that other-crimes evidence is not admissible is based on an appreciation of the prejudicial impact that the evidence may have. The dangers were concisely summarized in Whitty v. State, 34 Wis.2d 278, 292:

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The character rule excluding prior-crimes evidence as it relates to the guilty issue rests on four bases: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Despite these possibilities for prejudice, other-crimes evidence may be admissible if it is offered for an acceptable purpose under § 904.04(2)(a) and (b)1.

Section 904.04(2)(a)

The rule that originated in Whitty is codified in § 904.04(2)(a) of the Wisconsin Rules of Evidence:

(2) OTHER CRIMES, WRONGS, OR ACTS. (a) *General admissibility.* Except as provided in par. (b)2. evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The exception referred to — par. (b)2. — was created as § 904.04(2)(b) by 2005 Wisconsin Act 310. [Effective date: April 21, 2006. Section 3 of the act provides: "This act first applies to criminal actions commenced on the effective date of this subsection."] It was renumbered § 904.04(2)(b)2. by 2013 Wisconsin Act 362. It provides that in cases involving specified sex offenses, evidence of similar prior convictions is admissible to prove character. This exception is addressed by Wis JI-Criminal 276.

The Three-Step Analytical Framework

Before evidence of other acts is admitted, the trial court must apply a three-step test to determine that: 1) it is offered for an acceptable purpose under § 904.04(2)(a); 2) it is relevant; and, 3) its probative value is not outweighed by danger of unfair prejudice. State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998). The Sullivan decision noted: "This analytical framework (or one substantially similar) has been spelled out in prior cases, in Wis JI-Criminal 275 [© 1991] and in Wis JI-Criminal 275.1 [© 1990]." 216 Wis.2d 768, 771. [Note: JI 275.1 was withdrawn in 2015; much of its content was incorporated into this Comment.]

The first requirement — that the evidence is offered for an acceptable purpose under § 904.04(2)(a) — recognizes that Wisconsin appellate courts have held that the exceptions listed in § 904.04(2)(a) are "merely illustrative and not exclusive." See, for example, State v. Alsteen, 108 Wis.2d 723, 324 N.W.2d 426 (1982); State v. Spraggin, 77 Wis.2d 89, 100, 252 N.W.2d 94 (1977); State v. Kaster, 148 Wis.2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989); State v. Bedker, 149 Wis.2d 257, 440 N.W.2d 802 (Ct. App. 1989). Examples of acceptable purposes not named in § 904.04(2)(a) are found in footnote 12, below.

Even where a listed exception does apply, it may be difficult to determine which one does, because "[t]he exceptions listed in the statute are not mutually exclusive. The exceptions slide into each other; they are impossible to state with categorical precision and the same evidence may fall into more than one exception." State v. Tarrell,74 Wis.2d 647, 662, 247 N.W.2d 696 (1976) (Abrahamson J., dissenting). However, it is important to be sure either that a named exception applies, or that the evidence is admissible

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for another legitimate purpose so that the reason for the rule — to exclude evidence which is relevant only for showing a general disposition to commit a crime — is not violated. See State v. Spraggin, 77 Wis.2d 89, 100, 252 N.W.2d 94 (1977). For an example of evidence found to be admissible for multiple purposes, see State v. Marinez, 2011 WI 12, 331 Wis.2d 568, 797 N.W.2d 399, where other acts evidence was determined to be relevant to several proper purposes — identification, context, credibility, and time and location; it also provided a "complete story" to the jury.

The second requirement is that the evidence be "relevant," defined in Sullivan as having "two facets": whether it relates to a fact or proposition that is of consequence to the determination of the action; and, whether it has probative value — a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. 216 Wis.2d 768, 772. The relevancy requirement is not met if the issue on which the evidence is offered (e.g., identity) is not in dispute in the case (e.g., the defendant admits the act but claims there was consent). See Alsteen, supra. Or, to look at it another way, in such a case the probative value of the evidence would be minimal and would be outweighed by its prejudicial effect. See Judicial Council Committee's Note to § 904.04(2), 59 Wis.2d R79 (1973). While the defendant is under no general obligation to divulge trial strategy, some type of notice must be given to the trial judge to bring the "not in dispute" rule into play. State v. Bedker, 149 Wis.2d 257, 440 N.W.2d 802 (Ct. App. 1989).

To be relevant, the other acts must be similar to those at issue in the case. In State v. McGowan, 2006 WI App 80, 291 Wis.2d 212, 715 N.W.2d 631, a conviction for first degree sexual assault of a child was reversed because evidence of other acts was improperly admitted. The trial took place in 2003 based on conduct alleged to have occurred in 1993. The other acts evidence was of an alleged assault in 1985 when the defendant was 10 years old. The court concluded that the acts were not "sufficiently factually similar" to justify their admission. 291 Wis.2d 212, ¶20.

Another important part of the relevancy inquiry is determining that the other act is not too remote in time. State v. Friedrich, 135 Wis.2d 1, 25, 398 N.W.2d 763 (1987). "Remoteness in time does not necessarily render the evidence irrelevant, but it may do so when the elapsed time is so great as to negate all rational or logical connections between the fact to be proven and the other acts evidence." State v. Mink, 146 Wis.2d 1, 16-17, 429 N.W.2d 99 (Ct. App. 1988), citing State v. Sanford, 76 Wis.2d 72, 81, 250 N.W.2d 348 (1977). But see State v. Hurley, 2015 WI 35, ¶57, 361 Wis.2d 529, 861 N.W.2d 174, where testimony that Hurley sexually assaulted his younger sister 25 years before trial was found to be admissible.

The relevancy requirement may be satisfied by evidence of other crimes that occurred after the crime charged. Barrera v. State, 99 Wis.2d 269, 298 N.W.2d 820 (1980); State v. Pharr, 115 Wis.2d 334, 340 N.W.2d 498 (1983).

The third requirement provides that even if the evidence is admissible for an acceptable purpose and is relevant, the evidence must be excluded if its prejudicial impact exceeds its probative value and the necessity for its use. This balancing is of the type provided for in § 904.03, Wisconsin Rules of Evidence. State v. Sullivan, 216 Wis.2d 768, 773, 789, and State v. Spraggin, 77 Wis.2d 89, 95.

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The "Greater Latitude" Rule

Case Law

A "greater latitude" rule applies to making decisions on other acts evidence in sex crime cases, especially those involving child victims. State v. Davidson, 2000 WI 91, ¶51, 236 Wis.2d 537, 613 N.W.2d 606. "Greater latitude" applies to each step of the admissibility determination: identifying an acceptable purpose; determining relevance; and, balancing probative value against danger of unfair prejudice. State v. Hammer, 2000 WI 92, ¶23, 236 Wis.2d 686, 613 N.W.2d 629. Other acts evidence is not automatically admissible in child sex crimes cases; the three-step analysis must be applied, using the "greater latitude" rule. Davidson, supra, ¶52; courts must determine that the evidence is offered for a proper purpose. State v. Hunt, 2003 WI 81, ¶87, 263 Wis.2d 1, 666 N.W.2d 771.

The Wisconsin Supreme Court discussed the rationale for the "greater latitude" rule in State v. Friedrich, 135 Wis.2d 1, 398 N.W.2d 763 (1987). The court held that the rule is justified by the need to get evidence before the jury that shows the past history of a defendant's plans, schemes, and motives so that the jury can understand how someone could commit such a reprehensible act.

> [O]ur statute makes admissible evidence of those past acts of sexual exploitation of children which demonstrate a scheme or plan. That scheme is to take advantage of the trust children show toward adults. Child exploiters take advantage of a child's physical and emotional vulnerability in order to give gratification to their warped and perverted "propensities" and "leanings." It is this scheme or plan to achieve sexual stimulation or gratification from the young, the most sexually vulnerable in our society, that allows trial courts in the exercise of discretion to admit evidence of past similar acts to show scheme or plan to exploit children. 135 Wis.2d 1, 29.

"An additional rationale for the greater latitude rule 'is the need to corroborate the victim's testimony against credibility challenges.'" State v. Hurley, 2015 WI 35, ¶57, 361 Wis.2d 529, 861 N.W.2d 174, citing State v. Davidson, supra, ¶42.

State v. Hurley, supra, employed the Sullivan analysis using the greater latitude rule to affirm the admission of other acts evidence that involved testimony that Hurley sexually assaulted his younger sister 25 years before the current trial when he was 12 to 14 and she was 8 to 10. The court found the evidence was relevant to method of operation and motive, specifically the desire to achieve sexual arousal or gratification. The 25-year time gap was not significant given the similarity of the incidents and the fact that proper cautionary instructions were given. The instructions were given before and after the testimony and generally followed Wis JI-Criminal 275.

Section 904.04(2)(b)

Section 904.04(2)(b), as amended by 2013 Wisconsin Act 362, is titled "Greater latitude." However, the rules articulated in the subdivisions of that section differ from those established in the case law cited above.

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The Wisconsin Supreme Court addressed this issue in State v. Dorsey, 2018 WI 10, 379 Wis.2d 386, 906 N.W.2d 158, a case involving domestic abuse. The court held that greater latitude applies to domestic abuse cases [and the other crimes specified] even though the statute doesn't expressly say so in the text:

> ¶26: "We conclude that the recently amended language allows for the admission of other, similar acts of domestic abuse with greater latitude under a Sullivan analysis."
>
> . . .
>
> ¶35: "In sum, we conclude that § 904.04(2)(b)1. permits circuit courts to admit evidence of other, similar acts of domestic abuse with greater latitude, as that standard has been defined in the common law, under Sullivan, because it is the most reasonable interpretation in light of the context and purpose of the statute."

Subdivision 1. of § 904.04(2)(b) provides that in prosecutions for violations of specified statutes, "evidence of similar acts is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act." The specified statutes are: § 940.302(2) — human trafficking; Chapter 948; a serious sex offense, as defined in § 939.615 (1)(b) — these are the offenses subjecting a person to lifetime sex offender supervision; domestic abuse, as defined in § 968.075(1)(a); and, an offense subject to the domestic abuse surcharge in § 973.055.

The Committee considered two issues in connection with interpreting § 904.04(2)(b)1. First, the Committee concluded that the similar acts must still be offered for an acceptable purpose as set forth in sub. (2)(a) and as required by the first step of the Sullivan analysis. This is because sub. (2)(a) begins by stating: "Except as provided in par. (b)2." There is no exception for par. (b) 1., leading the Committee to conclude that the standard analysis applies. The only apparent effect of sub. (2)(b)1. is to make clear that the victim of the current crime need not be the same as the victim of other act. In State v. Dorsey, supra, the Wisconsin Supreme Court confirmed that the Sullivan analysis still applied, albeit with greater latitude applied at each stage: "Thus, for the types of cases enumerated under § 904.04(2)(b)1., circuit courts should admit evidence of other acts with greater latitude under a Sullivan analysis to facilitate its use for a permissible purpose." ¶33.

Second, the Committee concluded that all chapter 948 offenses are covered. This is based on reading the statute as applying in a criminal proceeding "alleging a violation s. 940.302(2) or of ch. 948," "alleging the commission of serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a)," or "alleging an offense that, following a conviction is subject to the surcharge in s. 973.055."

Subdivision 2. of § 904.04(2)(b) provides that in prosecutions "alleging violations of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order show that the person acted in conformity therewith." This is tied to the exception provided in sub. (2)(a): "Except as provided in par. (b)2. . . ." The exception is to the general rule in sub. (2)(a) that other acts evidence is not admissible to prove character. An instruction for use where prior convictions are admissible to prove character under § 904.04(2)(b)2. is provided in Wis JI-Criminal 276.

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Who Decides; Burden Of Proof

The determination of relevance, step two of the three-step Sullivan analysis, involves an important issue: Who decides whether the defendant committed the "other crime, wrong, or act" and by what standard of proof? The Wisconsin Court of Appeals resolved these questions in State v. Schindler, 146 Wis.2d 47, 429 N.W.2d 110 (Ct. App. 1988). The court adopted the rule set forth in Huddleston v. United States, 485 U.S. 681 (1988), where the U.S. Supreme Court was urged to require a trial judge to make a formal preliminary finding, by clear and convincing evidence, that the defendant committed the other acts. The court declined, holding that a formal preliminary finding is not required. The evidence is admissible if it is relevant, and it is relevant only if the jury can reasonably conclude that the defendant committed the act. The same general standards apply to the relevancy determination for other acts evidence that apply to any other relevancy determination. But no formal finding that the act occurred is required.

Therefore, under Schindler and Huddleston, a trial court must determine whether the evidence of the other acts was sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant committed the other acts. In the Committee's judgment, the jury is not to be instructed as to any burden of persuasion on this issue. The "by a preponderance" standard is used only by the trial court in determining admissibility. It is not to be passed on to the jury. Accord, United States v. Hudson, 884 F.2d 1016, 1021 (7th Cir. 1989).

"Conduct"; Acquittal Conduct

The "other acts" analysis can apply to what might technically not be considered "conduct." "Verbal statements may be admissible as other-acts evidence even when not acted upon." State v. Jeske, 197 Wis.2d 905, 914, 541 N.W.2d 225 (Ct. App. 1995) (citing three cases where statements were properly admitted, but affirming a trial court decision excluding the evidence). Admissibility of evidence that the defendant used an alias was treated as other acts evidence in State v. Bergeron, 162 Wis.2d 521, 470 N.W.2d 322 (Ct. App. 1991), and was found to be relevant to show the defendant's intent to cover up his participation in the sexual assault and as part of the background facts of the case. Also see, State v. Normington, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867 where evidence of pornographic images on the defendant's computer was properly admitted as "other acts" evidence tending to show motive.

In Dowling v. United States, 493 U.S. 342 (1990), the United States Supreme Court held that evidence of a prior offense for which the defendant was acquitted could be admitted as other acts evidence under Federal Rule of Evidence 404(b). The Court concluded that there was not a constitutional bar on the use of the evidence under either the collateral estoppel doctrine of the Double Jeopardy Clause or the due process requirement of fundamental fairness. The evidence could be excluded on nonconstitutional grounds that probative value is outweighed by the risk of unfair prejudice. The Wisconsin Court of Appeals followed Dowling in State v. Landrum, 191 Wis.2d 107, 528 N.W.2d 36 (Ct. App. 1995).

Other Acts By Third Parties

Evidence of other crimes or other acts committed by a third party may be admissible when offered by the defendant to show, for example, the identity of the person who committed the crime. State v. Scheidell, 227 Wis.2d 285, 595 N.W.2d 661 (1999). Admissibility is to be determined by using the same test that is used for other crimes or other acts committed by the defendant. But see, State v. Muckerheide, 2007 WI 5, 298 Wis.2d 553, 725 N.W.2d 930, where the defendant, charged with homicide by intoxicated use of a

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vehicle, was not entitled to introduce "other acts" evidence of the victim [his passenger] in support of the affirmative defense recognized by § 940.09(2). The evidence was that the victim/passenger had grabbed the steering wheel of a car on prior occasions and was offered in support of the defendant's contention that the victim/passenger grabbed the steering wheel of his car during the incident that caused the death.

In State v. Missouri, 2006 WI App 74, 291 Wis.2d 466, 714 N.W.2d 595, convictions for possession with intent to deliver and resisting arrest were reversed because the defendant was improperly denied the right to present "other acts" evidence showing misconduct by the police officer who arrested him. The evidence was relevant to show a motive to lie, to show that the officer intended to frame the defendant, and to show that the officer's prejudice toward black people causes him to commit physical assaults and use excessive force.

1. Whenever evidence has been admitted for a limited purpose, § 901.06 provides that a cautionary instruction must be given upon request.

The Wisconsin Supreme Court has held that the trial judge is under no obligation to give a cautionary instruction in the absence of a request by the defendant. Hough v. State, 70 Wis.2d 807, 817, 235 N.W.2d 534 (1975). The basis for the decision in Hough was a recognition that it may have been a tactical decision by the defense not to request an instruction, out of a desire not to call further attention to the prior act. However, the absence of a curative or limiting instruction has been considered by the court in finding that admission of other acts evidence constituted reversible error. State v. Spraggin, 77 Wis.2d 89, 101, 252 N.W.2d 94 (1977). It may be desirable, therefore, for the trial judge to inquire of the defense whether a cautionary instruction is requested and, if the defendant's tactical decision is not to request the instruction, to make a record of that decision. The trial judge may also wish to consider giving the instruction, or a variation thereof, at the time the other acts evidence is admitted in addition to the instruction given at the close of the case.

2. Evidence of other crimes or conduct may be admissible under more than one of the exceptions to the general rule that the evidence is not admissible to prove that the defendant acted in conformity with his generally bad character. Section 904.04(2)(a) and Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967). Care must be taken to assure that the evidence does in fact fit one of the recognized exceptions, State v. Spraggin, 77 Wis.2d 89, 252 N.W.2d 94 (1977), or that it is admissible for some other acceptable purpose. See note 3, below. A discussion of the individual issues on which other-crimes evidence is admissible is found in Slough and Knightly, "Other Vices, Other Crimes," 41 Iowa L. Rev. 325 (1956).

A common situation where more than one exception applies occurs in sexual assault cases involving sexual contact. Other acts evidence is often relevant to intent, motive, and absence of mistake. See, for example, State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447; and, State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331.

3. In this blank, name the purpose for which the evidence was admitted, if one of the named exceptions does not apply. The exceptions listed in § 904.04(2) are "merely illustrative and not exclusive." State v. Kaster, 148 Wis.2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989). See the cases listed in footnote 12, below.

4. See note 2, supra, regarding the applicability of more than one exception. See note 3, supra, regarding admissibility for a purpose not covered by a named exception.

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5. Wis JI-Criminal 175 provides an instruction on motive and may be included here. Or, if there is other evidence of motive, it may be preferable to give Wis JI-Criminal 175 at a different place. For cases where evidence of other acts was admitted to show motive, see State v. Tarrell, 74 Wis.2d 647, 247 N.W.2d 696 (1976), Holmes v. State, 76 Wis.2d 259, 251 N.W.2d 56 (1977), Hendrickson v. State, 61 Wis.2d 275, 212 N.W.2d 481 (1973), and Kelly v. State, 75 Wis.2d 303, 249 N.W.2d 800 (1977).

"Motive has been defined as the reason which leads the mind to desire the result of an act. In other words, a defendant's motive may show the reason why a defendant desired the result of the crime charged." State v. Gray, 225 Wis.2d 39, 54-55, 590 N.W.2d 918 (1998), quoting State v. Fishnick, 127 Wis.2d 247, 260, 378 N.W.2d 272 (1985). Also see State v. Plymesser, 172 Wis.2d 583, 594, 493 N.W.2d 367 (1992). Decisions dealing with motive exception include:

- State v. Hurley, 2015 WI 35, ¶74, 361 Wis.2d 529, 861 N.W.2d 174 [evidence of acts with a younger female family member was admissible to show motive — the desire to achieve sexual arousal or gratification].

- State v. Jensen, 2011 WI App 3, ¶¶83, 84, 331 Wis.2d 440, 794 N.W.2d 482 [evidence of pornographic photos the defendant left around the home was admissible to show motive — deep-seated and obsessive bitterness regarding his wife's prior affair gave him a motive to kill her].

- State v. Normington, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867 [evidence of pornographic images on the defendant's computer (showing insertion of objects into persons' anuses) was properly admitted as "other acts" evidence tending to show motive].

- State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447 [evidence of past sexual touchings by the defendant was admissible to show motive — the purpose of sexual contact].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331 [evidence of past sexual assaults by the defendant of his daughters was admissible to show motive — the purpose of sexual contact].

- State v. Meehan, 2001 WI App 119, 244 Wis.2d 121, 630 N.W.2d 722 [evidence of the defendant's prior conviction for sexual assault of an adult was not admissible at trial on a charge of sexual assault of a child; slim probative value as to intent and motive was outweighed by the danger of unfair prejudice].

- State v. Davidson, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 [prior conviction for sexual contact with young girl is admissible to show motive — the purpose of sexual contact].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show motive because there was no evidence that the prior offense provided a reason for committing the charge offense].

- State v. Anderson, 230 Wis.2d 121, 600 N.W.2d 913 (Ct. App. 1999) [other acts tended to show a motive to prevent victim from testifying against him].

- State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996) [parole agent's testimony about defendant's high risk parole status was admissible to show motive to flee from an officer].

- State v. Kourtidias, 206 Wis.2d 574, 585, 557 N.W.2d 858 (Ct. App. 1996): ". . . evidence of a defendant's probation or parole status and relevant conditions thereof are admissible in the proper exercise

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of judicial discretion if such evidence demonstrates the motive for, or otherwise explains, the defendant's alleged criminal conduct. Absent that scenario, such evidence is inadmissible because the nexus between the conduct and the potential penalty is too tenuous."

- State v. Tabor, 191 Wis.2d 483, 529 N.W.2d 915 (Ct. App. 1995) [evidence of prior sexual assaults of a child admissible to prove motive — the desire to obtain sexual gratification from children].

- State v. Plymesser, 172 Wis.2d 583, 493 N.W.2d 367 (1992) [evidence of prior sexual assaults of a child admissible to prove motive — the purpose of the sexual contact, which is an element of the crime].

6. Intent may be at issue, despite the defendant's claim that the act with which he or she is charged never occurred, and thus may be a permissible purpose for the introduction of other acts evidence. State v. Clark, 179 Wis.2d 484, 507 N.W.2d 172 (Ct. App. 1993), resolving possible conflict among decisions on this issue.

For cases where the admission of other acts evidence on the issue of intent is discussed, see Vanlue v. State, 96 Wis.2d 81, 291 N.W.2d 467 (1980), State v. Spraggin, State v. Tarrell, and Hendrickson v. State, supra. Evidence of crimes committed after the charged crime may be relevant to show intent. Barrera v. State, 99 Wis.2d 269, 298 N.W.2d 820 (1980). State v. Pharr, 115 Wis.2d 334, 340 N.W.2d 498 (1983). However, intent must be an issue in the case for this exception to apply. State v. Danforth, 129 Wis.2d 187, 385 N.W.2d 125 (1986).

Decisions addressing the intent exception include:

- State v. Veach, 2002 WI 110, 246 Wis.2d 395, 630 N.W.2d 256 [evidence of past sexual touchings by the defendant was admissible to show that the touching was intentional].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 348 [evidence of past sexual assaults by the defendant of his daughters was admissible to show that the touching was intentional].

- State v. Meehan, 2001 WI App 119, 244 Wis.2d 121, 630 N.W.2d 722 [evidence of the defendant's prior conviction for sexual assault of an adult was not admissible at trial on a charge of sexual assault of a child; slim probative value as to intent and motive was outweighed by the danger of unfair prejudice].

- State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833 [evidence of possession of sexually explicit videotapes admissible to show intent and motive as to a charge of enticing a child].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show intent because intent was not an element of the offense charged].

- State v. Anderson, 230 Wis.2d 121, 600 N.W.2d 913 (Ct. App. 1999) [evidence of prior convictions was relevant to put a statement into context, where that statement showed intent to kill a witness to prevent her from testifying against him].

- State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996) [parole agent's testimony about defendant's high risk parole status was admissible to show intent to flee from an officer].

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- State v. Rushing, 197 Wis.2d 631, 541 N.W.2d 155 (Ct. App. 1995) [evidence of prior consensual homosexual act is not admissible in a trial for sexual assault of a child based on sexual intercourse (fellatio) because intent is not an element of that crime].

- State v. Hereford, 195 Wis.2d 1054, 537 N.W.2d 62 (Ct. App. 1995) [evidence that defendant had possessed a gun three weeks earlier similar to the one used in the crime is admissible to show intent even though the defense theory was that the defendant did not shoot the victim].

- State v. Parr, 182 Wis.2d 349, 513 N.W.2d 647 (Ct. App. 1994) [evidence of prior similar sexual assault admissible to show intent and motive for the current charge].

- State v. Clark, 179 Wis.2d 484, 507 N.W.2d 172 (Ct. App. 1993) [evidence of a prior battery is admissible to show intent even where the defendant's theory of defense is that the injuries in the present case were caused by a fall rather than by the defendant].

- State v. Roberson, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990) [evidence of **later** possession of a stolen vehicle was admissible as relevant to intent because it tended to undermine the defendant's innocent explanation for his act].

7. For cases where the admission of other acts evidence on the issue of preparation or plan is discussed, see Haskins v. State, 97 Wis.2d 408, 294 N.W.2d 25 (1980), Spraggin, Tarrell, and Hendrickson, at note 6, supra.

"The word 'plan' in sec. 904.04(2) means a design or scheme formed to accomplish some particular purpose. . . . Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged. . . . [T]here must be 'such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations." State v. Gray, 225 Wis.2d 39, 53, 590 N.W.2d 918 (1999), quoting State v. Spraggin, 77 Wis.2d 89, 99, 252 N.W.2d 94 (1977). Also see:

- State v. Davidson, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 [prior conviction for sexual contact with young girl is admissible to show plan or scheme because it was sufficiently similar].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show common scheme or plan because there is no evidence that the priors were a step in a plan leading to the charged offense].

8. See State v. Johnson, 74 Wis.2d 26, 245 N.W.2d 687 (1976).

9. Other acts evidence is admissible to show identity if it has "such a concurrence of common features and so many points of similarity with the crime charged that it 'can reasonably be said that the other acts and the present act constitute the imprint of the defendant.'" State v. Gray, 225 Wis.2d 39, 51, 590 N.W.2d 918 (1999), quoting State v. Kuntz, 160 Wis.2d 722, 746, 467 N.W.2d 531 (1991) and State v. Fishnick, 127 Wis.2d 247, 263-64, 378 N.W.2d 272 (1985).

The classic case where other acts evidence was admitted to show identity is Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967). Also see Sanford v. State, 76 Wis.2d 72, 250 N.W.2d 348 (1976), and Hough v. State, 70 Wis.2d 807, 235 N.W.2d 534 (1975).

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Decisions addressing the identity exception include:

- State v. Hammer, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629 [evidence of previous sexual touching admissible to show identity by showing a mode or method of operation].

- State v. Rushing, 197 Wis.2d 631, 541 N.W.2d 155 (Ct. App. 1995) [evidence of prior consensual homosexual act is not admissible in a trial for sexual assault of a child because the two incidents were too dissimilar].

- State v. Wagner, 191 Wis.2d 322, 528 N.W.2d 85 (Ct. App. 1995) [evidence of prior assault was sufficiently similar to the charged crime to be admissible to show identity].

- State v. Murphy, 188 Wis.2d 508, 524 N.W.2d 924 (Ct. App. 1994) [evidence of ten prior robbery offenses were sufficiently similar to the charged crime to be admissible to show identity].

- State v. Speer, 176 Wis.2d 1101, 501 N.W.2d 429 (1993) [evidence that the defendant previously burglarized homes with "For Sale" signs in front during daylight hours showed identity].

- State v. Rutchik, 116 Wis.2d 61, 341 N.W.2d 639 (1984) [evidence that the defendant previously burglarized homes while the occupants were attending a funeral shows identity].

Related to, or overlapping with, the purpose to show "identity" is evidence relating to "method of operation." See, for example, State v. Hurley, 2015 WI 35, ¶¶63-69, 361 Wis.2d 529, 861 N.W.2d 174.

10. "Other acts evidence is properly admitted to show absence of mistake if it tends to undermine a defendant's innocent explanation for his or her behavior." State v. Evers, 139 Wis.2d 424, 437, 407 N.W.2d 256 (1987). "If a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable." Id. at 443. Cited with approval in State v. Gray, 225 Wis.2d 39, 56, 590 N.W.2d 918 (1999).

In State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998), the court found that the other acts evidence offered — verbal threats and abuse — was not probative of the defendant's intent or absence of accident with respect to a battery charge based on events two years later.

Evidence of the defendant's prior acts of hostility and aggressiveness was admitted as relevant to absence of mistake in King v. State, 75 Wis.2d 26, 248 N.W.2d 458 (1977). Decisions addressing this exception include:

- State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447 [evidence of past sexual touchings by the defendant was admissible to show that the touching was not a mistake or accident].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331 [evidence of past sexual assaults by the defendant of his daughters was admissible to show that the touching was not a mistake or accident].

- State v. LaBine, 198 Wis.2d 291, 542 N.W.2d 797 (Ct. App. 1995) [evidence of prior thefts of a truck admissible to show absence of accidental shooting in connection with a later taking of the truck].

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- State v. Bustamonte, 201 Wis.2d 562, 549 N.W.2d 746 (Ct. App. 1996) [evidence of prior acts of child abuse admissible to negate defendant's claim that death of child was accidental].

- State v. Roberson, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990) [evidence of **later** possession of a stolen vehicle was admissible as relevant to intent because it tended to undermine the defendant's innocent explanation for his act].

11. The Committee decided to add this alternative to the instruction because several cases have approved evidence admitted to show "context or background." In State v. Seibert, 141 Wis.2d 753, 761, 416 N.W.2d 900 (Ct. App. 1987), the court held that evidence of a pending sexual assault charge and violation of a no-contact order was properly admitted "to furnish part of the context of the alleged crime and a full presentation of the case." In State v. Shillcutt, 116 Wis.2d 227, 236-237, 341 N.W.2d 716 (Ct. App. 1983), the court held that evidence of the defendant's earlier solicitation of a prosecution witness to practice prostitution and of his physical abuse of her was properly admitted "to establish the background relationship between the witness and the defendant [and] was necessary to fully understand the context of the case."

Shillcutt quotes from United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980): an "accepted basis for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case."

For other decisions applying this purpose, see:

- State v. Marinez, 2011 WI 12, 331 Wis.2d 568, 797 N.W.2d 399 [other acts evidence was relevant to proper purposes — identification, context, credibility, and time and location; it also provided a "complete story" to the jury and was highly probative because it was "intertwined" with the sexual assault allegations].

- State v. Jensen, 2011 WI App 3, ¶84, 331 Wis.2d 440. 794 N.W.2d 482 [evidence of pornographic photos the defendant left around the home was admissible to show context and a full presentation of the case — his hostility and desire to seek revenge against wife for her affair].

- State v. Payano, 2009 WI 86, 320 Wis.2d 348. 768 N.W.2d 832 [testimony of a confidential informant about his observations of the defendant's possession of drugs and a handgun in the defendant's apartment on the day before the police executed a no-knock search warrant at the apartment provided context for an incident in which a police officer was shot by the defendant].

- State v. Bergeron, 162 Wis.2d 521, 470 N.W.2d 322 (Ct. App. 1991) [evidence that the defendant used an alias was treated as other acts evidence and found to be relevant as part of the background facts of the case].

- State v. Anderson, 230 Wis.2d 121, 130, 600 N.W.2d 913 (Ct. App. 1999) [evidence of prior convictions was admissible to show the context of a statement constituting a threat against a witness].

- State v. Hereford, 195 Wis.2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) [evidence that the defendant had possessed a gun three weeks earlier was admissible to show context and background for the statement, "I'm going to get my shit"].

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- State v. Rundle, 166 Wis.2d 715, 731, 480 N.W.2d 518 (Ct. App. 1992) [evidence of other incidents of abuse of the same victim is admissible "to permit the jury to fully understand the context of the charges" against the defendant].

12. Decisions recognizing other valid purposes that do not fit in the specified categories include the following:

- State v. Parr, 182 Wis.2d 349, 513 N.W.2d 647 (Ct. App. 1994) [suggesting that evidence of a prior similar sexual assault was admissible because it "bore directly on the truthfulness" of the defendant's and the victim's "competing and conflicting versions of the event"].

- State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993) [evidence of defendant's in-custody statement showing familiarity with marijuana was admissible to show elements of the crime of delivery of marijuana].

- State v. Patricia A. M., 176 Wis.2d 542, 553, 500 N.W.2d 289 (1993) [evidence of prior instances of sexual assault admissible to support the credibility of the victim and to help "explain to the jury how the charged acts could have occurred in the manner" the victim described].

- State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991) [evidence that the defendant stole the controlled substance that caused the death of the victim is admissible because it provides an aspect of the crime charge and gave "a complete presentation" of the case at trial].

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275.1 COMMENT: OTHER ACTS EVIDENCE

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 275.1 was originally published in 1990. It was withdrawn in 2015 when its content was revised and incorporated into the Comment to Wis JI-Criminal 275 CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CONDUCT [REQUIRED IF REQUESTED] — § 904.04(2)(a).

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276 PRIOR CONVICTIONS ADMISSIBLE TO PROVE CHARACTER — § 904.04(2)(b)2.

CAUTION: THIS INSTRUCTION APPLIES ONLY TO CASES ALLEGING A VIOLATION OF § 940.225(1) OR § 948.02(1)

Evidence has been received that (name of defendant) has been convicted of (first degree sexual assault) (first degree sexual assault of a child).

You may, but you are not required to, conclude from that evidence that the defendant has a certain character. You may also conclude, but you are not required to, that the defendant acted in conformity with that character with respect to the offense charged.

You should give this evidence the weight you believe it is entitled to receive. Before you may find the defendant guilty of the offense charged in this case, the State must satisfy you beyond a reasonable doubt that the defendant is guilty, based on all the evidence.

COMMENT

Wis JI-Criminal 276 was originally published in 2007. This revision was approved by the Committee in October 2015.

This instruction addresses § 904.04(2)(b)2., created as § 904.04(2)(b) by 2005 Wisconsin Act 310. [Effective date: April 21, 2006. Section 3 of the act provides: This act first applies to criminal actions commenced on the effective date of this subsection.] It was renumbered § 904.04(2)(b)2. by 2013 Wisconsin Act 362.

§ 904.04(2)(b)2. reads as follows:

> In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order show that the person acted in conformity therewith.

The reference to "sub. (1) and par. (a)" are to the general rules relating to evidence of character and of other crimes or acts.

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There are several limitations on the application of the new rule provided in § 904.04(2)(b):

1) it applies only in prosecutions for

- 1st degree sexual assault under § 940.225(1) and
- 1st degree sexual assault of a child under § 948.02(1);

2) it applies only to evidence of prior **convictions** for

- 1st degree sexual assault under § 940.225(1) and
- 1st degree sexual assault of a child under § 948.02(1);

- NOTE: it includes convictions "of a comparable offense in another jurisdiction"

3) the prior conviction must be similar to the alleged violation in the current trial.

- the Committee concluded that the "similar to" requirement applies not only to prior convictions in Wisconsin but also to prior convictions of a comparable offense in another jurisdiction.

When the requirements are met, the prior conviction is admissible "as evidence of the person's character in order to show that the person acted in conformity therewith." There is no express authority requiring an instruction in this situation. The Committee concluded that providing a suggested model instruction was advisable for use when the trial court decides that one should be given. This is not the typical situation where evidence is admitted for a limited purpose and a cautionary instruction is required if requested. See § 901.06. Rather, it is a situation where a usual limit is not applicable, so the instruction is actually describing the unlimited use authorized in a specific situation. The instruction reads the way it does because it states the opposite of the general rule that excludes priors to prove character.

The instruction is drafted for cases that clearly fit the situation addressed by the statute. There are possible difficulties with other situations that are likely to arise. For example, what if there are lesser included offenses or multiple charges that are not § 940.225(1) or § 948.02 violations? What if evidence of prior convictions is offered under the new rule and also under one of the traditional "other acts " exceptions? Further, the statute does not address whether details of the other crimes are admissible, whether offered by prosecution or by the defense.

The general prohibition on proving character is now found in a rule of evidence — § 904.04. But that rule had its origin in a decision of the Wisconsin Supreme Court, Whitty v. State, 34 Wis.2d 278, 148 N.W.2d 557 (1967), that was based on due process principles:

> ". . . the rule we adopt . . . is based upon the premise that the accused is entitled to a procedurally and evidentially fair trial . . ." 34 Wis.2d at 295.

> ". . . [when other acts evidence is admitted] it runs the danger . . . of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence." 34 Wis.2d at 297.

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The references to "fair trial" seem clearly to invoke a due process basis for the rule – it is the Due Process Clause that insures the right to a fair trial.

The Committee recommends a careful evaluation of the admissibility of evidence offered under the new rule to assure that it is relevant under §904.01 and that its probative value is not substantially outweighed under § 904.03: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Federal Rules of Evidence include two provisions that are similar to, but not the same as, the new Wisconsin rule.

Rule 413. Similar Crimes in Sexual Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

Rule 414. Similar Crimes in Child Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

The primary difference between the federal and the Wisconsin rule is that the federal rule allows consideration of the evidence "on any matter to which it is relevant " while the Wisconsin rule specifies that it may be admitted "as evidence of the person's character in order show that the person acted in conformity therewith."

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300 CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

[GIVE THE FOLLOWING PARAGRAPH ONLY WHEN THE DEFENDANT TESTIFIES.][1]

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[The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime. Use the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness.]

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

COMMENT

Wis JI-Criminal 300 was originally published in 1962 and revised in 1979, 1989, 1990, and 1991. This revision was approved by the Committee in June 1999.

The 1999 revision involved a substantial rewriting of the former instruction and was intended to make it more understandable without changing the meaning.

In Wilson v. State, 184 Wis. 636, 200 N.W. 369 (1924), the court approved the general instruction that as to each witness, the jury should take into consideration the appearance and manner of testifying, the apparent interest in the result of the trial, if any, the degree of intelligence of the witness, the reasonableness of the testimony given, and every other circumstance bearing upon credibility and weight.

The supreme court has allowed the trial court considerable latitude in instructions dealing with the credibility of witnesses. A few cases are illustrative. In Emery v. State, 101 Wis. 627, 78 N.W. 145 (1899), the court approved the following part of the instruction:

> You are cautioned, however, that interest in the result of the trial creates no presumption that such witnesses will swear falsely.

The trial court was criticized, on the other hand, in Lee v. State, 74 Wis. 45, 41 N.W. 960 (1889), for instructing that:

> When the witnesses appear to be equally credible in every other respect, the one who appears to have the greater interest in the result of the case is to have the less weight of the two.

The court remarked that this "trenches too closely . . . upon the legitimate function of the jury."

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The question has been raised with the Committee whether a special instruction should be given for police officer witnesses. One theory is that the instruction should advise that the testimony of the police officer witness is to be weighed by the same standards applied to other witnesses. In the Committee's judgment, no separate instruction is necessary; Wis JI-Criminal 300 would apply to all witnesses, including the police officer. A different theory is that an instruction should advise the jury that greater care should be taken in weighing the testimony of a police officer because of the officer's greater interest in gaining a conviction. The Wisconsin Supreme Court addressed that argument in State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970), and concluded that on the facts of that case, the general credibility instruction was sufficient.

1. The Committee recommends that instructing the jury on the credibility of the defendant be included in the general credibility instruction as indicated, rather than dealing with the credibility of the defendant separately.

Wis JI-Criminal 310 formerly dealt with the credibility of the defendant but was withdrawn by the Committee in 1979. However, the use of Wis JI-Criminal 310 was approved by the Wisconsin Supreme Court in Thompson v. State, 83 Wis.2d 134, 265 N.W.2d 467 (1978).

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305 FALSUS IN UNO

[USE OF THIS INSTRUCTION IS NOT FAVORED.]

If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all the testimony of the witness which is not supported by other credible evidence in the case.

COMMENT

Wis JI-Criminal 305 was originally published in 1962 and revised in 1979. It was republished without change in Release No. 28—12/91 and the comment was updated in 1994 and 1995. This revision involved nonsubstantive editorial changes and was approved by the Committee in April 2000.

In Ollman v. Health Care Liability Ins., 178 Wis.2d 648, 658-59, 505 N.W.2d 399 (Ct. App. 1993), the court made the following observations about the **falsus in uno** instruction:

> Wisconsin's **falsus in uno** instruction is a derivative of the old maxim, **falsus in uno, falsus in omnibus**, or translated, "false as to one thing, false as to all things." . . . In general, the falsus in uno instruction has fallen into disfavor among the courts of this country. The now prevailing attitude . . . is one of tolerance and sufferance. The instructions labor under faint praise, and are generally regarded as of little assistance to juries. [Citations omitted.]

In State v. Lagar, 190 Wis.2d 424, 434, 526 N.W.2d 836 (Ct. App. 1994), the court flatly stated that "[t]he **falsus in uno** instruction is not favored." The court also emphasized that the decision to give the instruction is within the wide discretion of the trial court: "The impeachment of a witness with prior statements does not necessarily mean that a **falsus in uno** instruction is appropriate. The testimony must be shown to be willful and intentional. The trial court was in the best position to make this call." Id. at 435.

The Committee recommends that the instruction not be routinely given.

In State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), the refusal to give the falsus in uno instruction was upheld where the witness maintained that her prior testimony was inconsistent because she was confused. The court noted that "[t]he falsus in uno instruction is not favored in the law," citing: Annot. 4 A.L.R.2d 1077 (1949), and emphasized the evidentiary basis required for giving the instruction:

> In order for the falsus in uno instruction to be appropriate, the false testimony must be on a material point and must be willful and intentional. Mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake are no basis for rejecting a witness's testimony entirely. 84 Wis.2d 370, 394.

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Williamson was cited with approval in State v. Robinson, 145 Wis.2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). See also State v. Lombardi, 8 Wis.2d 421, 99 N.W.2d 829 (1959).

The text of the instruction is supported by the older criminal cases dealing with this issue. See Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909). In Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909), the court approved the following language:

> If a witness testifies wilfully falsely as to any material matter in the trial of a case, the jury may, if they see fit, but are not bound to, reject all of such witness's evidence not corroborated by some other credible evidence. (pp. 82-83)

This instruction ought to be given only where the judge has some reason to believe a witness has testified falsely. In Pumorlo v. City of Merrill, 125 Wis. 102, 110, 103 N.W. 464 (1905), the supreme court referred to the falsus in uno instruction and said:

> To warrant the giving of such an instruction there must be a sufficient basis in the evidentiary facts and circumstances adduced as tends to show that there was wilfully false swearing. Whether such a rule applies to the consideration of the evidence of a case is primarily a question for the trial court and not for the jury.

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310 DEFENDANT AS WITNESS IN OWN BEHALF

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 310 was originally published in 1966. It was withdrawn by the Committee in 1979. This version was republished without change in 1991 and 2000.

The instruction was withdrawn because the Committee concluded that it is preferable to include reference to the credibility of the defendant in the instruction on credibility of all witnesses. An optional paragraph for use when the defendant testifies is included in the general credibility instruction. See Wis JI-Criminal 300.

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312 PRISONER AS WITNESS OR DEFENDANT: PRISONER STATUS AN ISSUE

Statutory Definition of the Crime

Evidence has been received that (the defendant) (witness (name of witness)) was a prisoner at (name of institution) . This evidence was received because the (defendant's) (witness') status as a prisoner is an issue in this case. It must not be used for any other purpose.

COMMENT

Wis JI-Criminal 312 was originally published in 1979 and revised in 1991 and 2001. This revision was approved by the Committee in October 2016.

This instruction is to be used when the offense charged requires proof that the defendant or a witness was a prisoner. Common examples would be cases involving escape under § 946.42 (Wis JI-Criminal 1770-1774), assaults by prisoners under § 946.43 (Wis JI-Criminal 1778 and 1779), or battery by prisoner under § 940.20(1) (Wis JI-Criminal 1222).

These cases differ from the usual situation where the defendant or a witness has a prior conviction (see Wis JI-Criminal 325 and 327) because the prior goes not only to credibility but also is a required element of the crime—the person's status of prisoner at the time of the offense.

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313 EVIDENCE THAT THE DEFENDANT WORE A GPS OR OTHER MONITORING DEVICE

Evidence has been presented regarding the fact that the defendant was wearing a (identify the monitoring device). Do not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case. Do not speculate on the reasons for which the defendant was required to wear a (identify the monitoring device).

COMMENT

Wis JI-Criminal 313 was approved by the Committee in December 2016.

This instruction is intended for use when the evidence has shown that the defendant was wearing a monitoring device at the time of the offense. This may arise due to the nature of the crime – for example, tampering with a GPS tracking device in violation of § 946.465. Or, reference to a device may have been made in a description of the arrest or interrogation of a suspect. For an example of a case where this was an issue, see State v. Romanelli, an unpublished decision of the Wisconsin Court of Appeals, decided December 17, 2015 [Appeal No. 2014AP874].

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314 DEFENDANT WEARING A VISIBLE RESTRAINING DEVICE IN THE PRESENCE OF JURORS

The defendant has appeared in court wearing a restraining device. This must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 314 was originally published in 2009. This revision added to the Comment and was approved by the Committee in June 2011; it added "visible" to the title and updated the Comment.

This instruction is intended to implement the requirement identified in State v. Champlain, 2008 WI App 5, 307 Wis.2d 232, 744 N.W.2d 889. Champlain held that "whenever a defendant wears a restraint in the presence of jurors trying the case, the court should instruct that the restraint is not to be considered in assessing the proof and determining guilt." 2008 WI App 5, ¶33.

Champlain also held that "under the circumstances of this case, the trial court had an affirmative, sua sponte duty to inquire into the necessity for the [security] device once the court became aware of the situation." 2008 WI App 5, ¶32. A general reference to "custom and practice" or to the policy of the sheriff's department is not sufficient. State v. Miller, 2011 WI App 34, 331 Wis.2d 732, 797 N.W.2d 528, at footnote 2, citing State v. Grinder, 190 Wis.2d 541, 552, 527 N.W.2d 326 (1995).

Neither the duty to make an inquiry nor the duty to instruct arises in a case where the restraints are not visible to the jury. State v. Miller, supra, ¶11.

Wisconsin case law has recognized that, generally, a criminal defendant should not be restrained during the trial. Sparkman v. State, 27 Wis.2d 92, 133 N.W.2d 776 (1965). However, physical restraint may be imposed if the trial finds restraint reasonably necessary to maintain order. State v. Cassel, 48 Wis.2d 619, 180 N.W.2d 607 (1970).

State v. Cassel, supra, cited with approval the then-current ABA Standard for criminal justice that addressed the restraint issue. The current version of that standard provides in part as follows:

> Standard 15-3.2. Control, restraint or removal of defendants and witnesses
>
> . . . .
>
> (c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order. In ordering remedial measures, the court must take all reasonable steps to preserve the defendant's right to confrontation of witnesses and consultation with counsel.

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(d) If the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

ABA Standards For Criminal Justice, Trial By Jury (3rd Ed. 1994).

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315 DEFENDANT ELECTS NOT TO TESTIFY

[TO BE GIVEN ONLY IF REQUESTED BY DEFENDANT.][1]

A defendant in a criminal case has the absolute constitutional right not to testify.

The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 315 and comment were originally published in 1962 and revised in 1979, 1981, and 1985. Wis JI-Criminal 315 was republished without change in 1991. The 2001 revision updated the comment.

Wis JI-Criminal 315 is to be used in cases where there have been no unusual circumstances calling attention to the accused's failure to testify. For example, where the prosecutor makes improper comments about the defendant's failure to take the witness stand, a more detailed instruction may be required which directs the jury to disregard the comment. See State v. Jackson, 219 Wis. 13, 261 N.W. 732 (1935). Wis JI-Criminal 315 is also not appropriate where reference has been made to the accused's silence at the time of arrest; such situations, to the extent they are curable by jury instructions, will require a different type of admonition.

Wis JI-Criminal 315 also does not deal with the unique issues presented in the rare case where a defendant elects not to testify but makes an opening statement or a closing argument to the jury. See State v. Johnson, 121 Wis.2d 237, 258 N.W.2d 824 (Ct. App. 1984).

An instruction like Wis JI-Criminal 315 must be given when requested by the defendant. Carter v. Kentucky, 450 U.S. 288 (1981). However, the trial court does not have the obligation to give the instruction sua sponte in the absence of a request by the defendant. The Committee recommends that the instruction not be given unless requested, see discussion in note 1, below.

Subsection 905.13(1) provides that a claim of privilege is not a proper subject for comment by judge or counsel. Subsection 905.13(3) provides that upon request, a party against whom the jury might draw an adverse inference from a claim of privilege is entitled to a jury instruction that no such inference is to be drawn. In criminal cases, these sections apply to the privilege against self-incrimination. Wis JI-Criminal 315 does not use the precise statutory language: ". . . draw no inference therefrom." The Committee concluded that the direction that the exercise of the privilege "must not be considered by you in any way and must not influence your verdict" is a more understandable equivalent of "draw no inference."

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Evidence providing an explanation for a defendant's failure to take the stand is not relevant. State v. Heuer, 212 Wis.2d 58, 61, 567 N.W.2d 638 (Ct. App. 1990).

1. The Committee recommends that Wis JI-Criminal 315 be given only when requested by the defendant. In Champlain v. State, 53 Wis.2d 751, 193 N.W.2d 868 (1972), the Wisconsin Supreme Court held that giving the instruction in the absence of defense request or objection was not reversible error. But the court noted that the giving of such an instruction is a matter of trial strategy and that ". . . the better practice is for the trial judge to give the instruction only if it is requested by the defendant. . . . In a case where the trial court might feel because of the facts and the lack of skill of counsel for the defense such an instruction might well be given, the trial judge might properly offer such instruction for defense counsel's consideration." 53 Wis.2d 751, 758. But see Price v. State, 37 Wis.2d 117, 130, 154 N.W.2d 222 (1967), which suggests that this should be done only in the case where there is unusual disparity in the skill of counsel.

The giving of the instruction over the defendant's objection was reviewed and upheld by the U.S. Supreme Court in Lakeside v. Oregon, 435 U.S. 333 (1978). The defendant argued that giving the instruction, even though the instruction was intended to be neutral, constituted an impermissible comment on his constitutional right not to testify. The Court held that the Constitution forbids only adverse comment on the failure to testify. Correctly instructing the jury in the meaning of the privilege against self-incrimination is not an adverse comment; it is more like an instruction on basic concepts like burden of proof and reasonable doubt. The Court also rejected the defendant's claim that the giving of the instruction violated his right to counsel by interfering with the planned trial strategy. The Court noted, however:

> It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments.

435 U.S. 333, 340-41.

The Committee recommends that Wis JI-Criminal 315 be given only when requested by the defendant. It must be given if there is a proper request. Carter v. Kentucky, 450 U.S. 288 (1981).

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317 WITNESS EXERCISING PRIVILEGE AGAINST SELF-INCRIMINATION

A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate the witness.

(Name of witness)'s decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 317 was originally published in 1981 and revised in 1991 and 1994. The 2001 revision adopted a new format without substantive change.

This instruction must be given if properly requested (§ 905.13(3)). It should not be given unless it is requested.

Generally, a claim of privilege should be made outside the presence of the jury. Section 905.13(2) provides:

> Claiming Privilege Without Knowledge Of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

For a discussion of recommended procedures, see **SM-55, INQUIRY WHEN A WITNESS CLAIMS THE PRIVILEGE AGAINST SELF-INCRIMINATION.**

Refusing to allow a defendant to call a witness and require that witness to claim the privilege in front of the jury does not deprive the defendant of the due process right to present a defense. State v. Heft, 178 Wis.2d 823, 505 N.W.2d 437 (1994). Heft also held that § 905.13(3) does not violate equal protection in prohibiting comment on the exercise of the privilege in criminal cases but allowing it in civil cases.

Also see ABA Standards Relating To Criminal Justice 3-5.7(c) and 4-7.6(c) relating to the duty of counsel where a witness is expected to claim a valid privilege not to testify.

When a witness refuses to answer a question or questions on the basis of the privilege against self-incrimination, the trial court has discretion to strike the entire testimony of the witness, providing the claim of privilege does not go to collateral matters only. Ryan v. State, 95 Wis.2d 83, 90, 289 N.W.2d 349 (Ct. App. 1979); State v. Monsoor, 56 N.W.2d 689, 203 N.W.2d 20 (1973) [but see State ex rel. Monsoor v. Cady, 497 F.2d 1126 (7th Cir. 1974)]; Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975).

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Whether or not striking the witness' testimony is appropriate, an instruction like Wis JI-Criminal 317 may be helpful, either by itself or in addition to Wis JI-Criminal 150, Stricken Testimony. Subsection 905.13(1) provides that a claim of privilege is in general not a proper subject for comment by judge or counsel, but § 905.13(3) provides that "[u]pon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." In criminal cases, these sections apply to the privilege against self-incrimination. Wis JI-Criminal 317 does not use the precise statutory language: ". . . draw no inference therefrom." The Committee concluded that the direction that the exercise of the privilege "must not be considered by you in any way and must not influence your verdict in any manner" is a more understandable equivalent of "draw no inference."

When a witness makes a valid claim of the privilege against self-incrimination, it is within the sole discretion of the district attorney to request that the court order the witness to testify. If the court grants the motion and orders a witness to testify notwithstanding a valid claim of privilege, the witness enjoys immunity concerning matters related to the subject of his testimony. See section 972.08. The Wisconsin Supreme Court has on several occasions rejected the argument that defendants should have a reciprocal power to compel the testimony of witnesses. Peters v. State, supra; Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Elam v. State, 50 Wis.2d 383, 184 N.W.2d 176 (1971). The court has also made it clear that trial courts have no authority to sua sponte compel testimony, in the absence of a request by the prosecutor. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Shelley v. State, 89 Wis.2d 263, 278 N.W.2d 251 (Ct. App. 1979).

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320 IMPEACHMENT OF THE DEFENDANT BY PRIOR INCONSISTENT STATEMENTS WHICH ARE INADMISSIBLE IN THE STATE'S CASE-IN-CHIEF

[MUST BE GIVEN UPON REQUEST.][1]

Evidence has been received that the defendant made a statement[2] before trial which is inconsistent with the defendant's testimony in court.

This evidence may be taken into consideration only to help you decide if what the defendant said in court was true.

It must not be considered as proof of the facts contained in the statement.

COMMENT

Wis JI-Criminal 320 was originally published in 1971 and was revised in 1976, 1981, 1985, 1986, and 1991. The 2001 revision adopted a new format without substantive change.

Wis JI-Criminal 320 is to be given upon request where a defendant's prior inconsistent statement, inadmissible during the state's case-in-chief because it was unconstitutionally obtained, is admitted for impeachment purposes. Such statements are limited to impeachment use, provided they were voluntarily made and are inconsistent with the defendant's testimony.

A brief summary of the history of JI-320 may avoid confusion. In its original form, copyright 1971, Wis JI-Criminal JI-320 cautioned that all prior inconsistent statements were limited to impeachment use. Such was the law of Wisconsin until the adoption of the Rules of Evidence in 1974. Under subsec. 908.01(4)(a)1 of the new Rules, prior inconsistent statements could be used as substantive evidence— they were no longer limited to impeachment use. See Wis JI-Criminal 320A, where the history of the Wisconsin rules relating to impeachment by and substantive use of prior inconsistent statements is summarized.

Wis JI-Criminal 320 (© 1971) was withdrawn in 1976 and replaced with an instruction that applied only to statements of the defendant obtained in violation of Miranda. Such statements continue to be admissible only for impeachment purposes (provided they are voluntary). This is the situation addressed by the current version of Wis JI-Criminal JI-320, though it can also be used where impeachment use is allowed of statements obtained in violation of the 4th or 6th amendment.

The law relating to the impeachment use of statements obtained in violation of Miranda and other constitutional guarantees is summarized below, immediately following footnote 2.

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1. When evidence is admitted for a limited purpose, an instruction restricting the evidence to its proper scope shall be given upon request. Section 901.06.

2. The Committee decided not to include any characterization of the statement in terms of why it is admissible for impeachment purposes only. Referring to the statement as "obtained in violation of his constitutional rights" or "obtained before he was advised of his rights" may be distracting or confusing and was therefore not included in the instruction. Further, there can be a number of reasons why a statement may have been obtained in violation of Miranda: no advice at all; advice given too late; advice incorrect; proper advice followed by illegal interrogation; and others. Thus, it would be difficult to include a description of the statement in a model instruction that would be correct in all cases.

However, sometimes it may be helpful to further identify a statement, as, for example, where there are several statements, some admissible for substantive purposes and some limited to impeachment use. In such cases, it may be useful to refer to a statement by the date it was made, by referring to the person to whom it was made, or in some other way.

IMPEACHMENT USE OF OTHERWISE INADMISSIBLE STATEMENTS

The primary issue being considered here is the impeachment use of statements made in violation of the 5th amendment, as protected by the rules announced in Miranda. But three other constitutional principles also restrict the admissibility of out-of-court statements made by criminal defendants:

- Due process, based on the 14th amendment, precludes the use of statements that are not "voluntary." As noted above, involuntary statements are not admissible as direct evidence or for impeachment purposes.

- The 6th amendment excludes statements obtained in violation of the right to counsel afforded by that amendment. In Michigan v. Harvey, 494 U.S. 344 (1990), the Court upheld the impeachment use of statements obtained in violation of rule that any waiver of 6th amendment rights following discussions initiated by police is invalid per se. [This case is the so-called prophylactic rule of Edwards v. Arizona, 451 U.S. 477 (1981), applied to 6th amendment cases by Michigan v. Jackson, 475 U.S. 625 (1986).]

- The 4th amendment exclusionary rule forbids the direct use of statements resulting from illegal arrest or detention. Such statements appear to be admissible for impeachment, but the United States Supreme Court decisions on the subject are not completely consistent. See Agnello v. United States, 269 U.S. 20 (1925); Walder v. United States, 347 U.S. 62 (1954); and United States v. Havens, 446 U.S. 620 (1980). The decisions are discussed in LaFave, Search and Seizure, § 11.6(a) (West 1987).

The rule allowing impeachment use of statements obtained in violation of Miranda is summarized in State v. Mendoza, 96 Wis.2d 106, 118-19, 291 N.W.2d 478 (1980):

> A statement of the defendant made without the appropriate Miranda warnings, although inadmissible in the prosecution's case-in-chief, may be used to impeach the defendant's credibility if the defendant testifies to matters contrary to what is in the excluded statement. Harris v. New

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York, 401 U.S. 222 (1971); State v. Oliver, 84 Wis.2d 316, 320, 321, 267 N.W.2d 333 (1978); Upchurch v. State, 64 Wis.2d 553, 562, 563, 219 N.W.2d 363 (1974); Wold v. State, 57 Wis.2d 344, 353-356, 204 N.W.2d 482 (1973). It is only if the statements are also found to be involuntary that their use for impeachment purposes is precluded. Upchurch v. State, supra, at 353-56.

The Wisconsin Supreme Court has recommended that a finding on a statement's usability for impeachment purposes be made as part of the Miranda-Goodchild inquiry:

> When a court conducts a hearing to determine the admissibility of evidence in chief, it should make a determination for the use of such evidence, both in chief and for impeachment, and expressly make a finding concerning the trustworthiness as well as such other grounds for admission or exclusion as the evidence permits. However, evidence excluded on direct should not be used for impeachment unless the accused takes the stand and testifies to matters directly contrary to what is in the excluded statement. The foundation for the use of the impeaching statements must be found in prior testimony. Wold v. State, 57 Wis.2d 344, 355-56, 204 N.W.2d 482 (1973).

To be used for impeachment, the statement must be voluntary. A statement found to be "involuntary" on due process grounds may not be used in chief or for impeachment. "Voluntariness" for these purposes requires that the statement must "represent the uncoerced free will of the defendant" and not be "the result of conditions in which the defendant had been deprived of the ability to make a rational choice." Upchurch v. State, 64 Wis.2d 553, 563, 219 N.W.2d 363 (1974). A statement is not "involuntary" unless "improper police practices [were] deliberately used to procure a confession." State v. Clappes, 136 Wis.2d 222, 239, 401 N.W.2d 759 (1987). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connelly, 479 U.S. 157, 167, (1986).

It appears to the Committee that a question exists about the admissibility, as direct evidence or for impeachment, of statements that qualify as "voluntary" under the test requiring government coercion but which might not be trustworthy. For example, what about statements which result from threats from a private party or from fear of mob violence? Unreversed decisions of both the United States and Wisconsin Supreme Courts indicate that a showing of trustworthiness is required: ". . . [the court should] . . . expressly make a finding concerning trustworthiness as well as such other grounds for exclusion as the evidence permits." Wold v. State, 57 Wis.2d 344, 355-56; "It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." Harris v. New York, 401 U.S. 222, 224 (1971). However, Colorado v. Connelly, supra, indicates that voluntariness is the only constitutional concern and that other questions relating to admissibility are to be resolved under state rules of evidence. While the constitutional issue may not be completely resolved, the Committee believes that before an allegedly untrustworthy statement is admitted, its relevance should be evaluated carefully and its probative value weighed against any danger of unfair prejudice, confusion of the issues, or misleading the jury. See §§ 904.01 an 904.03.

If the statement used to impeach was admissible under Miranda so that it could have been used in the state's case-in-chief, this instruction should not be given. See Ameen v. State, 51 Wis.2d 175, 186 N.W.2d 206 (1971).

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320A LAW NOTE: SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

[THE COMMITTEE HAS CONCLUDED THAT AN INSTRUCTION ON THIS TOPIC IS NOT NECESSARY.][1]

COMMENT

Wis JI-Criminal 320A was originally published in 1989 and republished as a law note without substantive change in 2001.

Prior to the adoption of the Rules of Evidence in 1974, all prior inconsistent statements were limited to impeachment use. Wis JI-Criminal 320 (© 1971) was the cautionary instruction for use in such situations. However, under § 908.01(4)(a)1, prior inconsistent statements can be used as substantive evidence. Wis JI-Criminal 320 was amended in 1976 to apply only to prior inconsistent statements obtained in violation of Miranda. Such statements continue to be admissible only for impeachment purposes (provided they are voluntary and trustworthy).

Wis JI-Criminal 320A was created in 1989 to provide a more accessible place for a discussion of the substantive use of prior inconsistent statements. The history of the Wisconsin rule is set forth in the Comment to Wis JI-Civil 420, which is included below, following note 1.

1. The Committee concluded that a separate instruction on the substantive use of prior inconsistent statements is not necessary. Under the current rules, such statements are to be treated the same as any other evidence.

In State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (1980), the defendant claimed it was error for the trial court to refuse to give a special instruction on prior inconsistent statements. He specifically requested Wis JI-Criminal 320 (© 1971), which limited the consideration of such statements to impeachment use. The trial court refused, giving general instructions on credibility (Wis JI-Criminal 300 and 305) instead. The court of appeals upheld the trial court, noting that the evidentiary rule had changed and that the prior inconsistent statements could be considered as substantive evidence. "Although no special attention was drawn to the prior inconsistent statements, . . . no such treatment was needed. The jury was entitled under the instructions given to determine the weight to be accorded the victim's statements." 99 Wis.2d 430 at 442.

In State v. Lenarchik, 74 Wis.2d 425, 247 N.W.2d 80 (1976), the Wisconsin Supreme Court held that "where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." 74 Wis.2d at 436.

The Comment to Wis JI-Civil 420 offers the following summary of the development of the rule allowing substantive use of prior inconsistent statements.

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SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

In the past edition, Wis JI-Civil 420 instructed that prior inconsistent statements of a witness could not be considered by the jury as substantive evidence. The Committee withdrew this instruction in 1980 due to changes in statutory and case law as explained below.

Based on Wis. Stat. § 908.01(4)(a)1 and the decision of the Wisconsin Supreme Court in Vogel v. State, 96 Wis.2d 372, 291 N.W.2d 838 (1980), a prior inconsistent statement may be considered by the jury as substantive evidence when:

1. the statement in question is inconsistent with the declarant's testimony at trial, and

2. the declarant is available for cross-examination concerning the statement.

The evidentiary rule governing the use of prior inconsistent statements at trial has undergone a marked change since the court's 1956 decision in State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956). In Major, the court adhered to the long-standing rule that previous inconsistent statements of a witness could not be accorded any value as substantive evidence. Instead, such statements could only be used at trial for the limited purpose of impeachment.

In 1969, the court modified this general rule by holding that under certain conditions, a witness' prior inconsistent statement could be regarded as substantive evidence. Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969). Following the Gelhaar decision, the Committee's comment to Wis JI-Civil 420 set forth the following conditions under which prior statements could be considered by the jury as substantive evidence:

(1) When the witness acknowledges making the statement, or the statement is proved to have been written or signed by him, or given by him as testimony in a former judicial or official hearing, and

(2) When the witness has testified to the same events in a contrary manner at the present proceedings, and

(3) When the party against whom the statement is offered is afforded an opportunity to cross-examine the witness.

The modified rule in Gelhaar admitting certain extrajudicial statements as substantive evidence did not, however, include prior consistent statements, nor did it apply to the prior inconsistent statements of a party's own witness, even if hostile. The limitations on the use of prior inconsistent statements which were retained in Gelhaar were reaffirmed in Irby v. State, 60 Wis.2d 311, 315, 210 N.W.2d 755 (1973).

Under the Wisconsin Rules of Evidence, adopted after the Irby decision, inconsistent statements are not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement. Wis. Stat. § 908.01(4)(a)1 states in pertinent part:

908.01 Definitions. The following definitions apply under this chapter: . . .

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(4) Statements which are not hearsay. A statement is not hearsay if: (a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with his testimony, ...

In Vogel v. State, supra, the supreme court concluded that this new rule of evidence eliminated all impediments to the substantive use of the prior inconsistent statements of a witness:

> We therefore conclude that the court of appeals was correct in its holding that Lindsey's prior inconsistent statement was properly admissible under the Wisconsin Rules of Evidence as substantive evidence against the defendant. The statement in question was inconsistent with Lindsey's testimony at trial and he was available for cross-examination concerning it. Under Sec. 908.01(4)(a)1, no more is required. 96 Wis.2d at 386.

See also State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980), in which the court of appeals cited State v. Vogel to support the use of prior inconsistent statements as substantive evidence.

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325 IMPEACHMENT OF WITNESS: PRIOR CONVICTION OR JUVENILE ADJUDICATION

Statutory Definition of the Crime

Evidence has been received that (one) (some) of the witnesses[1] in this trial (has) (have) been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the witness's character for truthfulness. It must not be used for any other purpose.

COMMENT

Wis JI-Criminal 325 was originally published in 1962 and revised in 1979, 1991, 1996, and 2001. This revision was approved by the Committee in June 2018.

This instruction is to be given upon request when evidence of prior convictions is admitted to impeach a witness other than the defendant. See Wis JI-Criminal 327 for an instruction on impeachment of a defendant who has testified. Evidence of prior crimes admitted as "other acts" evidence under § 904.04(2) is addressed by Wis JI-Criminal 275.

The 2018 revision changed the second sentence of the instruction to refer to "character for truthfulness" in place of "credibility." This conforms the instruction to the text of § 906.09 as amended by order of the Wisconsin Supreme Court, effective January 1, 2018. See 2017 WI 92. The first two subsections of the amended statute read as follows:

> **906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency.** (1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:
>
> (a) The lapse of time since the conviction.
> (b) The rehabilitation or pardon of the person convicted.
> (c) The gravity of the crime.
> (d) The involvement of dishonesty or false statement in the crime.

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(e) The frequency of the convictions.
(f) Any other relevant factors.

A comprehensive Judicial Council Note explains the change and is published in the Wisconsin Statutes.

The 1996 revision added "adjudicated delinquent" to the instruction. Section 906.09 was amended by 1995 Wisconsin Act 77 to allow impeachment by evidence of juvenile adjudication.

The rationale for allowing the proof of prior convictions to impeach is that one who has been convicted of a crime is less likely to be a truthful witness. See State v. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429 (Ct. App. 1995); State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991); Liphford v. State, 43 Wis.2d 367, 168 N.W.2d 549 (1969). But the admissibility is supposed to be limited to this purpose — the effect on credibility. Whenever evidence is admitted for a limited purpose, a jury instruction describing the limits must be given on request. See Wis. Stat. § 901.06.

Section 906.09 as amended codifies the common law rule addressed in Nicholas v. State, 49 Wis.2d 683, 183 N.W.2d 11 (1971). A testifying defendant, or any other witness, can be asked two questions: (1) "Have you ever been convicted of a crime?" and (2) "How many times?" If the witness answers truthfully, that ends it. If the witness is not truthful, questions can be asked about each conviction, referring to them by the name of the offense. But the questioner may not go into the facts relating to the underlying crimes. Also see State v. Sohn, 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995); and State v. Midell, 39 Wis.2d 733, 159 N.W.2d 614 (1968).

A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. State v. Smith, 203 Wis.2d 288, 295-96, N.W.2d (Ct. App. 1996), citing State v. Kruzycki, supra at 525. These factors are now codified in § 906.09(2). The court must also determine that the probative value of the evidence is not outweighed by the danger of unfair prejudice. See §§ 906.09(3) and 901.04.

1. It is within the trial judge's discretion to refer to the witness by name. See Koss v. State, 217 Wis. 325, 258 N.W. 860 (1935).

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327 IMPEACHMENT OF DEFENDANT AS A WITNESS: PRIOR CONVICTION OR JUVENILE ADJUDICATION

Evidence has been received that the defendant (name) has been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the defendant's character for truthfulness as a witness. It must not be used for any other purpose, and, particularly, you should bear in mind that a [criminal conviction] [juvenile adjudication] at some previous time is not proof of guilt of the offense now charged.

COMMENT

Wis JI-Criminal 327 was originally published in 1962 and revised in 1979, 1991, 1996, and 2001. This revision was approved by the Committee in June 2018.

This instruction is to be given upon request when evidence of prior convictions is admitted to impeach a defendant who has testified. See Wis JI-Criminal 325 for an instruction on impeachment of a witness other than the defendant. Evidence of prior crimes admitted as "other acts" evidence under § 904.04(2) is addressed by Wis JI-Criminal 275.

The 2018 revision changed the second sentence of the instruction to refer to "character for truthfulness" in place of "credibility." This conforms the instruction to the text of § 906.09 as amended by order of the Wisconsin Supreme Court, effective January 1, 2018. See 2017 WI 92. The first two subsections of the amended statute read as follows:

> **906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency.** (1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:
>
> (a) The lapse of time since the conviction.
> (b) The rehabilitation or pardon of the person convicted.
> (c) The gravity of the crime.
> (d) The involvement of dishonesty or false statement in the crime.

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(e) The frequency of the convictions.
(f) Any other relevant factors.

A comprehensive Judicial Council Note explains the change and is published in the Wisconsin Statutes.

The 1996 revision added "adjudicated delinquent" to the instruction. Section 906.09 was amended by 1995 Wisconsin Act 77 to allow impeachment by evidence of juvenile adjudication.

The rationale for allowing the proof of prior convictions to impeach is that one who has been convicted of a crime is less likely to be a truthful witness. See State v. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429 (Ct. App. 1995); State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991); Liphford v. State, 43 Wis.2d 367, 168 N.W.2d 549 (1969). But the admissibility is supposed to be limited to this purpose — the effect on credibility. Whenever evidence is admitted for a limited purpose, a jury instruction describing the limits must be given on request. See Wis. Stat. § 901.06.

Section 906.09 as amended codifies the common law rule addressed in Nicholas v. State, 49 Wis.2d 683, 183 N.W.2d 11 (1971), the court addressed the common law rule in existence in Wisconsin before the adoption of the Rules of Evidence. The present rule under § 906.09 is the same. A testifying defendant, or any other witness, can be asked two questions: 1) "Have you ever been convicted of a crime?" and, 2) "How many times?" If the witness answers truthfully, that ends it. If witness is not truthful, questions can be asked about each conviction, referring to them by the name of the offense. But the questioner may not go into the facts relating to the underlying crimes. Also see State v. Sohn, 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995); and State v. Midell, 39 Wis.2d 733, 159 N.W.2d 614 (1968).

A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. State v. Smith, 203 Wis.2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996), citing State v. Kruzycki, supra at 525. The court must also determine that the probative value of the evidence is not outweighed by the danger of unfair prejudice. See §§ 906.09(3) and 901.04.

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330 IMPEACHMENT OF WITNESS: CHARACTER FOR TRUTHFULNESS

Statutory Definition of the Crime

Evidence has been received regarding a witness's character for truthfulness. You may consider this evidence in weighing the testimony and determining credibility.

COMMENT

Wis JI-Criminal 330 was originally published in 1962 and revised in 1979, 1991, and 2001. This revision was approved by the Committee in June 2018; it added to the Comment.

The admissibility of evidence of a witness' character for truthfulness or untruthfulness is dealt with by Wis. Stat. § 906.08. A defendant who testifies may introduce evidence of character for truthfulness in all cases. See Wis JI-Criminal 270 and comment. With other witnesses, no such evidence may be introduced until the witness' character for truthfulness has been attacked.

Section 906.08 was amended by order of the Wisconsin Supreme Court, effective January 1, 2018. See 2017 WI 92. The general rule in sub. (1) addressed by this instruction was not affected. A comprehensive Judicial Council Note explains the change and is published in the Wisconsin Statutes.

In Spencer v. State, 132 Wis. 509, 112 N.W. 462 (1907), the Wisconsin Supreme Court held that evidence that a witness' reputation for truth and veracity has not been discussed in the community may be considered as evidence of good reputation in that respect. The Committee felt that this rule goes primarily to the admissibility of the evidence and was not an essential part of this jury instruction.

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340 CREDIBILITY OF CHILD WITNESS

The testimony of a child should be weighed in the same manner as testimony of any other witness. Considerations of age, intelligence, ability to observe and report correctly, ability to understand the questions and to answer them, sense of duty to speak the truth, conduct on the witness stand, interest, appearance, and other matters bearing on credibility apply to a child witness in common with all witnesses.

COMMENT

Wis JI-Criminal 340 was originally published in 1962 and revised in 1979 and 1991. The 2001 revision adopted a new format without substantive change.

Whether this instruction should be added to Wis JI-Criminal 300 is a matter of discretion with the trial judge. The age at which a minor is to have his testimony evaluated as that of a mature person has never been determined by the Wisconsin Supreme Court.

There has never been an absolute rule that a special instruction on the credibility of a child witness is necessary, especially where the court has instructed the jury on the credibility of witnesses generally with Wis JI-Criminal 300. In Collier v. State, 30 Wis.2d 101, 140 N.W.2d 252 (1966), it was held that a special instruction on the credibility of a seven-year-old boy was not necessary, where Wis JI-Criminal 300 was given. The same conclusion was reached in Marks v. State, 63 Wis.2d 769, 218 N.W.2d 328 (1974), concerning a twelve-year-old boy.

Under Wis. Stat. § 906.01, all persons are deemed competent witnesses (except in certain situations described in Wis. Stat. §§ 885.16 and 885.17, the so-called Dead Man's Statutes). Thus, the weight and credibility of the child witness' testimony becomes the only issue, a question solely for the jury. This rule was reaffirmed in State v. Hanson, 149 Wis.2d 474, 439 N.W.2d 133 (1989), and State v. Dwyer, 149 Wis.2d 850, 440 N.W.2d 344 (1989).

Under Wis. Stat. § 906.03(1), all persons are required to take an oath before testifying. However, the child witness need not take a formal oath, provided there is at least a solemn promise to tell the truth or the equivalent. See Judicial Council Committee Note to § 906.03, 59 Wis.2d R162. It has been held that where an eight-year-old child was extensively questioned by the court, and by counsel for both parties, as to her telling the truth, that there was no error in admitting her testimony without an oath or solemn promise. State v. Davis, 66 Wis.2d 636, 225 N.W.2d 505 (1975). "How an oath or affirmation directed by the statute

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is modified or dispensed with when testimony is elicited from young children lies within the sound discretion of the circuit court. Each case must be decided on its own merits." State v. Hanson, supra at 482. Also see State v. Dwyer, supra.

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345 MISSING WITNESS

[THE COMMITTEE RECOMMENDS THAT A MISSING WITNESS INSTRUCTION NOT BE GIVEN IN CRIMINAL CASES.]

COMMENT

Wis JI-Criminal 345 was originally published in 1979 and revised in 1985 and 1991. The 2001 revision adopted a new format without substantive change.

The previous versions of this instruction did not include a separate criminal jury instruction on the missing witness issue. Rather, the counterpart civil instruction, Wis JI-Civil 410 Witness: Absence, was incorporated by reference.

The Committee had previously concluded that such an instruction should never be given against the defendant in a criminal case and that it would rarely be appropriate for use against the state. The Committee has now concluded that the situations where the instruction is called for are so rare that it is best to recommend that it not be given. The conditions for giving the instruction, discussed below, are so strict that they could rarely be fulfilled under modern rules of discovery and disclosure.

The Wisconsin Supreme Court has said that the absent witness instruction should be "narrowly construed to be applicable only to those cases where the failure to call a witness leads to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth." Ballard v. Lumbermens Mut. Casualty Co., 33 Wis.2d 601, 615, 616, 148 N.W.2d 65 (1967). The giving of the instruction is proper only if it is reasonable to infer, under the circumstances of the case, that the missing testimony would have been unfavorable to the party failing to call the witness. A party need not call every possible witness lest his failure to do so will result in an inference against him. State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979), citing Valiga v. National Food Co., 58 Wis.2d 232, 206 N.W.2d 377 (1973). The witness must in fact have been more accessible to one side than to another, there must be no other reasonable explanation for not calling the witness (absolute physical unavailability, for example, should not weigh against either party), and the witness' testimony must be relevant and noncumulative. Further, a party may have many reasons for not calling a witness which are unrelated to that witness' testimony being unfavorable: the witness may not be convincing on the stand; he or she may have a criminal record that would be exposed on cross-examination; or the witness may be unwilling to testify and therefore not be cooperative or helpful to the party's case. Before a missing witness instruction is given, all these factors, and others, need to be explored. Given the time-consuming nature of such exploration and the risk of jury confusion on the collateral issue of what an absent witness would have said, the Committee feels it is better practice not to give the instruction unless a case presents itself where the issue is especially important.

Where the prosecution requests the instruction be given against the defendant, even greater problems are present. Great care must be taken to make it clear that the defendant need not testify and need not present evidence in his own behalf. It is very difficult to square these principles with a jury instruction telling the

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jury they may draw an adverse inference from the failure to call a witness. Given this difficulty, the Committee recommends that the missing witness instruction not be given against the defendant.

It should also be noted that § 971.23(8) prevents any comment on the withdrawal of an alibi defense or on the failure to call an alibi witness.

Whether or not the parties are free to raise the missing witness issue in argument is a related question. The Committee feels that such argument is proper provided that the facts support the inference that the missing testimony would be unfavorable. Extreme care is required where the prosecutor seeks to raise the argument, however.

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375 NEGLIGENCE DEFINED

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 375 was originally published in 1962. It was withdrawn by the Committee in 1995. The 2001 revision adopted a new format without substantive change.

This instruction provided a definition of ordinary negligence. Crimes involving negligence require "criminal negligence," a term defined in each instruction for offenses which require it. Wis JI-Criminal 925 also provides a definition of "criminal negligence" and a Comment collecting relevant case law.

If a definition of ordinary negligence is required, one is included as part of the definition of "criminal negligence" in Wis JI-Criminal 925. Also see Wis JI-Civil 1005, Negligence: Defined.

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400 PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT EITHER DIRECTLY COMMITTED OR INTENTIONALLY AIDED THE CRIME CHARGED

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

Two Ways in Which Defendant Can Be a Party to a Crime

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charge), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

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State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name crime charged) or intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.[3]

Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[4]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[5] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant directly committed all _____[7] elements of (name crime charged) or that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 400 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400 (© 1962) provided a single model that included all of the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with the facts required for party to crime liability. This structure is believed to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provides for submitting more than one theory of liability to the jury: directly committing the crime; and aiding and abetting the person who directly committed the crime. Wis JI-Criminal 401 is drafted for the case where aiding and abetting and being a member of a conspiracy are submitted. Wis JI-Criminal 402 is drafted for the case where all three alternatives are submitted.

For an illustration of how this instruction would be applied in a burglary case, see Wis JI-Criminal 400 EXAMPLE.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

3. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

4. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

5. Insert the appropriate number of elements from the uniform instruction for the crime charged.

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the

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defendant." In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.

Wis JI-Criminal 400 EXAMPLE illustrates the integration of the instructions for a burglary case.

7. Insert the appropriate number of elements from the uniform instruction for the crime charged.

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400 EXAMPLE PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT EITHER DIRECTLY COMMITTED OR INTENTIONALLY AIDED A BURGLARY

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

Two Ways in Which Defendant Can Be a Party to a Crime

The State contends that the defendant was concerned in the commission of the crime of burglary by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet a burglary, the defendant must know that another person is committing or intends to commit the crime of burglary and have the purpose to assist the commission of that crime.

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

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State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of burglary or intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.

Statutory Definition of the Crime

Burglary , as defined in §943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters the building of another without the consent of the person in lawful possession and with intent to steal.[1]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements of burglary were present.

Elements of the Crime That the State Must Prove

1. The defendant or _____[2] intentionally entered a building.
2. The defendant or _____ entered the building without the consent of the person in lawful possession.
3. The defendant or _____ knew that the entry was without consent.
4. The defendant or _____ entered the building with intent to steal.

"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and the intent to deprive the owner permanently

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of possession of the property. It requires knowledge that the property belonged to another person and that the person did not consent to the taking of the property.

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant directly committed all four elements of burglary or that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 400 EXAMPLE was originally published in 1994. This revision was approved the Committee in April 2005 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction illustrates the application of Wis JI-Criminal 400 to a case involving burglary. Wis JI-Criminal 400 applies when two theories of party to crime liability are submitted: directly committing the crime; and, aiding and abetting the person who directly committed the crime.

1. See Wis JI-Criminal 1421 for the complete instruction on burglary with intent to steal.

2. If the name of the person who directly committed the crime is known, it should be inserted in the blank and used throughout the instruction. If the case presents the unusual situation where the name of that person is not known, use "another person" in the first blank and "the person" or "that person" in the other blanks.

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401 PARTY TO CRIME: DEFENDANT EITHER INTENTIONALLY AIDED THE CRIME CHARGED OR WAS A MEMBER OF A CONSPIRACY TO COMMIT THE CRIME CHARGED

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

Two Ways in Which Defendant Can Be a Party to a Crime

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by either intentionally aiding and abetting the person who directly committed it or by being a member of a conspiracy to commit the crime.

If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. And if a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

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[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

Definition of Being A Member of a Conspiracy

A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime.[3] A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.[4]

[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.]

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged) or was a member of a conspiracy to commit that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant aided and abetted or was a member of a conspiracy to commit the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of the two ways I have defined for you.[5]

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Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[6]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[7] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged) or that the defendant was a member of a conspiracy to commit that crime and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed],[9] you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 401 was originally published in 1995. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400, © 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

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In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with facts required for party to crime liability. This structure is believe to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provide for submitting more than one theory of liability to the jury. Wis JI-Criminal 400 is drafted for a case where directly committing the crime and intentionally aiding and abetting are submitted. Wis JI-Criminal 402 is drafted for the case where directly committing, aiding and abetting, and being a member of a conspiracy are submitted. This instruction is drafted for the case where aiding and abetting and conspiracy are supported by the evidence.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

3. The description of a "member of a conspiracy" is based on the statement in § 939.31 which defines the inchoate crime of conspiracy. The conduct and agreement are the same in both situations. The only distinction is whether the crime is actually committed.

A person cannot be convicted under both § 939.31 for conspiracy and under § 939.05 as a party to a crime which is the objective of a conspiracy. § 939.72.

4. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." There is an extensive discussion of this issue in note 3, Wis JI-Criminal 410.

5. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

6. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

7. Insert the appropriate number of elements from the uniform instruction for the crime charged.

8. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the defendant." In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.

9. The material in brackets should be added if the jury was instructed on withdrawal from a conspiracy. See § 939.05(2)(c) and Wis JI-Criminal 412.

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402 PARTY TO CRIME: DEFENDANT EITHER DIRECTLY COMMITTED, INTENTIONALLY AIDED, OR WAS A MEMBER OF A CONSPIRACY TO COMMIT THE CRIME CHARGED

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

Three Ways in Which Defendant Can Be a Party to a Crime

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) in one of the following three ways:

1) by directly committing it;

2) by intentionally aiding and abetting the person who directly committed it; or,

3) by being a member of a conspiracy to commit the crime.

If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. And if a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

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To intentionally aid and abet (name crime charged), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

Definition of Being A Member of a Conspiracy

A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime.[3] A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.[4]

[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.]

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name crime charged), intentionally aided and abetted the commission of that crime, or was a member of a conspiracy to commit that crime.

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Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant directly committed, intentionally aided and abetted, or was a member of a conspiracy to commit the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those three ways.[5]

Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[6]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[7] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant directly committed all _____[9] elements of (name crime charged), or that the defendant intentionally aided and abetted the commission of that crime, or that the defendant was a member of a conspiracy to commit that crime and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed],[10] you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 402 was approved by the Committee in April 2005.

The originally published version of Wis JI-Criminal 400, © 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with facts required for party to crime liability. This structure is believe to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provide for submitting more than one theory of liability to the jury. Wis JI-Criminal 400 is drafted for a case where directly committing the crime and intentionally aiding and abetting are submitted. Wis JI-Criminal 401 is drafted for the case where aiding and abetting and being a member of a conspiracy are submitted. This instruction is drafted for the case where all three theories are supported by the evidence.

For an illustration of how this instruction would be applied in a burglary case, see Wis JI-Criminal 402 EXAMPLE.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

3. The description of a "member of a conspiracy" is based on the statement in § 939.31 which defines the inchoate crime of conspiracy. The conduct and agreement are the same in both situations. The only distinction is whether the crime is actually committed.

A person cannot be convicted under both § 939.31 for conspiracy and under § 939.05 as a party to a crime which is the objective of a conspiracy. § 939.72.

4. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." There is an extensive discussion of this issue in note 3, Wis JI-Criminal 410.

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5. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

6. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

7. Insert the appropriate number of elements from the uniform instruction for the crime charged.

8. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the defendant." In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.

9. Insert the appropriate number of elements from the uniform instruction for the crime charged.

10. The material in brackets should be added if the jury was instructed on withdrawal from a conspiracy. See § 939.05(2)(c) and Wis JI-Criminal 412.

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405 PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT INTENTIONALLY AIDED THE CRIME CHARGED

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends that[1] the defendant was concerned in the commission of the crime of (name crime charged) by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

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State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of (name crime charged) was committed and that the defendant intentionally aided and abetted the commission of that crime.

Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[4] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME; USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that (name of principal)[6] committed all _____ elements of (name crime charged) and that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 405 was originally published in 1994. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment. This revision was approved by the Committee in April 2005 and involved nonsubstantive editorial changes.

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[An instruction previously identified as Wis JI-Criminal 405 (c. 1992) has been withdrawn. See Wis JI-Criminal 418.]

The substance of this instruction was formerly contained in Wis JI-Criminal 400 (c. 1962). The 1994 revision of Wis JI-Criminal 400 provided separate instructions for the different bases of party to crime liability. See the Comment to Wis JI-Criminal 400.

This instruction is for the case which is submitted to the jury solely on the theory that the defendant aided and abetted the person who directly committed the crime. For an illustration of how the model would be applied in a burglary case, see Wis JI-Criminal 405 EXAMPLE.

For a case involving the "natural and probable consequences" variety of aiding and abetting, see Wis JI-Criminal 406.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

3. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

4. Insert the appropriate number of elements from the uniform instruction for the crime charged.

5. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

6. If the name of the principal is known, it should be inserted in the blank. If the case presents the unusual situation where the name of the principal is not known, use "another person."

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405 EXAMPLE PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT INTENTIONALLY AIDED A BURGLARY

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends that the defendant was concerned in the commission of the crime of burglary by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet burglary, the defendant must know that another person is committing or intends to commit the crime of burglary and have the purpose to assist the commission of that crime.

USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

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State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of burglary was committed and that the defendant intentionally aided and abetted the commission of that crime.

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements of burglary were present.

Elements of the Crime That the State Must Prove

1. _____[1] intentionally entered a building.
2. _____ entered the building without the consent of the person in lawful possession.
3. _____ knew that the entry was without consent.
4. _____ entered the building with intent to steal.

"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and intent to deprive the owner permanently of possession of the property. It requires knowledge that the property belonged to another person and that the person did not consent to the taking of the property.

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When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that _____ committed all four elements of burglary and that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 405 EXAMPLE was originally published in 1996. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment. This revision was approved by the Committee in April 2005 and involved nonsubstantive editorial changes.

This instruction illustrates the application of Wis JI-Criminal 405 to a case involving burglary.

1. If the name of the principal is known, it should be inserted in the blank and used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" in the first blank and "the person" or "that person" in the other blanks.

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406 PARTY TO CRIME: AIDING AND ABETTING: THE CRIME CHARGED IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE INTENDED CRIME

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. A person who intentionally aids and abets the commission of one crime is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of (name intended crime), that (name charged crime) was committed, and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended crime).

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

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[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

First consider whether the defendant intentionally aided and abetted the crime of (name intended crime).

Statutory Definition of the Intended Crime

(Name intended crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the intended crime).[2]

State's Burden of Proof — Intended Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[3] elements of (name intended crime) were present.

Elements of the Intended Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE INTENDED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[4]

Next consider whether the crime of (name charged crime) was committed.

Statutory Definition of the Charged Crime

(Name charged crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the charged crime).[5]

State's Burden of Proof — Charged Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[6] elements of (name charged crime) were present.

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Elements of the Charged Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[7]

Natural and Probable Consequences

Finally, consider whether under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).[8]

A crime is a natural and probable consequence of another crime if, in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of (name charged crime) was likely to result from the commission of (name intended crime), then you may find that under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of (name intended crime), that (name charged crime) was committed, and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended crime), you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 406 was originally published in 1994. This revision was approved the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400, © 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

This instruction is intended for the case where the defendant is alleged to be guilty as a party to a crime on the theory that he or she intentionally aided and abetted a crime, of which the charged crime is a natural and probable consequence. For an example of such a case, see State v. Ivy, 119 Wis.2d 591, 350 N.W.2d 622 (1984). Other cases recognizing this theory are State v. Cydzik, 60 Wis.2d 683, 211 N.W.2d 421 (1973), and State v. Asfoor, 75 Wis.2d 411, 249 N.W.2d 529 (1977).

For an illustration of how this model would be applied to a case with first degree intentional homicide as a natural and probable consequence of armed robbery, see Wis JI-Criminal 406 EXAMPLE.

In State v. Hoover, 2003 WI App 117, 265 Wis.2d 607, 666 N.W.2d 74, the court found an instruction to be adequate even though it did not define the intended crime. The court noted that "it would be advisable" to give a brief summary of the intended crime. Id. at ¶33. The instruction goes farther, in that it calls for including complete definitions of the intended crime and the charged crime.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. Here summarize the definition of the intended crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

3. Insert the appropriate number of elements from the uniform instruction for the intended crime.

4. The primary change required in integrating the instruction for the intended crime is to phrase it in terms of another person committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime..

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

5. Here summarize the definition of the charged crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

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6. Insert the appropriate number of elements from the uniform instruction for the crime charged.

7. The primary change required in integrating the instruction for the charged crime is to phrase it in terms of another person committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is now known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

8. The Committee concluded that whether one crime is a "natural and probable consequence" of another is an issue of fact to be determined by reference to the circumstances of each case. This is consistent with the approach of the Wisconsin Supreme Court in State v. Ivy, 119 Wis.2d 591, 350 N.W.2d 622 (1984) (reversing 115 Wis.2d 645, 341 N.W.2d 408 (Ct. App. 1983)). Neither Ivy nor the other decisions dealing with the "natural and probable consequences" theory provide a definition of that term. The definition in the instruction was developed after extensive deliberation and review. It equates "natural and probable consequences" with foreseeability, evaluated from the point of view of one in the defendant's position at the time of the alleged offense. This type of definition is consistent with the use of the term in tort law:

> Natural and probable consequences. To some extent there are difficulties of language. Many courts have said that the defendant is liable only if the harm suffered is the "natural and probable" consequence of his act. These words frequently appear to have been given no more definite meaning than "proximate" itself. Strictly speaking, all consequences are "natural" which occur through the operation of forces of nature, without human intervention. But the word, as used, obviously appears not to be intended to mean this at all, but to refer to consequences which are normal, not extraordinary, not surprising in the light of ordinary experience. "Probable," if it is to add anything to this, must refer to consequences which were to be anticipated at the time of the defendant's conduct. The phrase therefore appears to come out as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance.

Prosser, The Law of Torts, 4th ed., p. 252 (West 1971).

If foreseeability is required in the context of negligence, the Committee reasoned that its equivalent, at a minimum, must be applicable in criminal cases employing the "natural and probable consequence" theory.

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406 EXAMPLE PARTY TO CRIME: AIDING AND ABETTING: FIRST DEGREE INTENTIONAL HOMICIDE AS THE NATURAL AND PROBABLE CONSEQUENCE OF ARMED ROBBERY

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends that the defendant was concerned in the commission of the crime of first degree intentional homicide by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it. A person who intentionally aids and abets the commission of one crime is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of armed robbery, that first degree intentional homicide was committed, and that under the circumstances, first degree intentional homicide was a natural and probable consequence of armed robbery.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

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[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

First consider whether the defendant intentionally aided and abetted the crime of armed robbery.

Statutory Definition of the Intended Crime

Armed robbery, as defined in § 943.32 of the Criminal Code of Wisconsin, is committed by one who, with the intent to steal and by use or threat of use of a dangerous weapon, takes property from the person or presence of the owner by [using force against the person of the owner with intent to overcome physical resistance or physical power of resistance to the taking or carrying away of the property] [or] [by threatening the imminent use of force against the person of the owner with intent to compel the owner to submit to the taking or carrying away of the property].

State's Burden of Proof – Intended Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements of armed robbery were present.

Elements of the Intended Crime That the State Must Prove

1. (Name) was the owner of property.
2. _____ took and carried away property from the person or from the presence of (name).
3. _____ took the property with the intent to steal.
4. _____ acted forcibly.
5. At the time of the taking or carrying away, _____ used or threatened to use a dangerous weapon.

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ADD THE FOLLOWING IF THE CASE INVOLVES A THREAT TO USE A WEAPON AND NO WEAPON OR OTHER ARTICLE IS ACTUALLY DISPLAYED:

[This element does not require that _____ actually display or possess a dangerous weapon. It is sufficient if the victim reasonably believed defendant had a dangerous weapon at the time of the threat. Whether the victim reasonably believed that _____ was armed with a dangerous weapon is to be determined from the standpoint of the victim at the time of the alleged offense. The standard is what a person of ordinary intelligence and prudence would have believed under the circumstances that existed at that time.]

Meaning of Owner

"Owner" means a person who has possession of property.

Meaning of Intent to Steal

"Intent to steal" means that _____ had the mental purpose to take and carry away property of another without consent and that _____ intended to deprive the owner permanently of possession of the property. [It further requires that _____ knew that the property belonged to another and knew that the person did not consent to the taking of the property.]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Meaning of Forcibly

"Forcibly" means that _____ [used force against (name) with the intent to overcome or prevent physical resistance or physical power of resistance to the taking or

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carrying away of the property] [or] [threatened the imminent use of force against (name) with the intent to compel (name) to submit to the taking or carrying away of the property].

Meaning of Imminent

"Imminent" means "near at hand" or "on the point of happening."

Meaning of Dangerous Weapon

A "dangerous weapon" is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).

Next consider whether the crime of first degree intentional homicide was committed.

Statutory Definition of the Charged Crime

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with inent to kill that person or another.

State's Burden of Proof – Charged Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements of first degree intentional homicide were present.

Elements of the Charged Crime That the State Must Prove

1. _____ caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.

2. _____ acted with the intent to kill ((name of victim)) (another human being).

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"Intent to kill" means that _____ had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Natural and Probable Consequences

Finally, consider whether under the circumstances first degree intentional homicide was a natural and probable consequence of armed robbery.

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A crime is a natural and probable consequence of another crime if, in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of first degree intentional homicide was likely to result from the commission of armed robbery, then you may find that under the circumstances first degree intentional homicide was a natural and probable consequence of armed robbery.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of the crime of armed robbery, that first degree intentional homicide was committed, and that under the circumstances, first degree intentional homicide was a natural and probable consequence of armed robbery, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 406 EXAMPLE was originally published in 1994. This revision was approved the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction illustrates the application of Wis JI-Criminal 406 to a case where the defendant is alleged to be guilty of first degree intentional homicide as a natural and probable consequence of aiding and abetting an armed robbery. It incorporates parts of the uniform instructions for armed robbery [Wis JI-Criminal 1480] and first degree intentional homicide [Wis JI-Criminal 1010]. The footnotes to those instructions should be consulted for information on substantive issues.

The primary change required in integrating the instruction for the underlying crime with the party to crime instruction is to phrase it in terms of another person directly committing the crime rather than referring to "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime. The draft provides a blank where the reference to "the defendant" would typically appear. If the name of the principal is known, it should be inserted in each blank. If the case presents the unusual situation where the name of the principal is not known, use "another person" in the first blank and "the person" or "that person" in the others.

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407 PARTY TO CRIME: AIDING AND ABETTING: MULTIPLE COUNTS

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends[1] that the defendant was concerned in the commission of the following crimes by intentionally aiding and abetting the person who directly committed them: (name each crime charged) .

If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charged) , the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

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State's Burden of Proof

Before you may find the defendant guilty of any of the crimes charged, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of that crime.

The crime charged in Count One is (name crime charged).

Statutory Definition of (Name Crime Charged)

(Name crime charged in Count One), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[4] elements of (name crime charged in count One) were present.

Elements of (Name Crime Charged) That the State Must Prove

DEFINE THE ELEMENTS OF THE CRIME CHARGED IN COUNT ONE. USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[5]

Jury's Decision – Party to the Crime of (Name Crime Charged in Count One)

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged in Count One), you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

The crime charged in Count Two is (name crime charged).

Statutory Definition of (Name Crime Charged)

(Name crime charged in Count Two), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[6]

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State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[7] elements of (name crime charged in Count Two) were present.

Elements of (Name Crime Charged) That the State Must Prove

DEFINE THE ELEMENTS OF THE CRIME CHARGED IN COUNT TWO. USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[8]

Jury's Decision – Party to the Crime of (Name Crime Charged in Count Two)

If you are satisfied beyond a reasonable doubt that the defendant intentionally aided and abetted the commission of (name crime charged in Count Two), you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

REPEAT THE ABOVE FOR EACH ADDITIONAL COUNT.

COMMENT

Wis JI-Criminal 407 was originally published in 1995. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction adapts the standard instruction for aiding and abetting for use in multiple count cases. The assumption is that two or more counts are charged, each based on the defendant being concerned in the commission of the crime by aiding and abetting the person who directly committed it. The Committee concluded that it will avoid repetition and aid clarity to read the aiding and abetting definition once and then relate that definition to each count. If the counts charge additional violation of the same criminal statute, further consolidation is possible by not repeating the elements of the crime. See Wis JI-Criminal 116 and 116 EXAMPLE.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

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2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

3. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

4. Insert the appropriate number of elements from the uniform instruction for the crime charged.

5. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

6. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

7. Insert the appropriate number of elements from the uniform instruction for the crime charged.

8. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

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410 PARTY TO CRIME: CONSPIRACY TO COMMIT THE CRIME CHARGED

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) as a member of a conspiracy to commit that crime.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Being A Member of a Conspiracy

A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime.[2] A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.[3]

[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.]

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that (name crime charged) was committed and that the defendant was a member of a conspiracy to commit that crime.

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Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state elements of the crime).[4]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[5] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "A MEMBER OF THE CONSPIRACY" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant was a member of a conspiracy to commit (name crime charged) and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed],[7] you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 410 was originally published in 1994. This revision was approved by the Committee inApril 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400, © 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

This instruction is for the case which is submitted to the jury solely on the theory that the defendant was a member of a conspiracy to commit the crime. For an illustration of how the model would be applied in a burglary case, see Wis JI-Criminal 410 EXAMPLE.

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1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The description of a "member of a conspiracy" is based on the statement in § 939.31 which defines the inchoate crime of conspiracy. The conduct and agreement are the same in both situations. The only distinction is whether the crime is actually committed.

A person cannot be convicted under both § 939.31 for conspiracy and under § 939.05 as a party to a crime which is the objective of a conspiracy. § 939.72.

3. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." While such a requirement was cited with approval in State v. Nutley, 24 Wis.2d 527, 556, 129 N.W.2d 155 (1964), later decisions have concluded that a "stake in the venture" is not required. The leading cases are discussed briefly here.

In United States v. Falcone, 109 F.2d 579 (CCA2d, 1940), the defendant was a wholesaler who sold large quantities of sugar and 5-gallon cans to grocers who sold them to bootleggers. Quantities greatly increased when illegal stills were active. The court held there was no conspiracy:

> There are indeed instances of criminal liability of the same kind [as civil liability], where the law imposes punishment merely because the accused did not forbear to do that which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.

In Direct Sales Co. v. United States, 319 U.S. 703 (1943), the defendant was a wholesale drug distributor who sold great quantities of morphine through the mail to a doctor in a small town. Sales were so large and frequent that Direct Sales must have known that the drugs could not be legally dispensed. The court held that a conspiracy was established. The key distinction between his case and Falcone lies in the nature of the commodities: the morphine was incapable of further legal use except by compliance with rigid regulations.

> This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote, and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.
>
> When the evidence discloses such a system, . . . there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also

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> a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy.

319 U.S. 703, 713.

The issue was addressed by the Wisconsin Supreme Court in State v. Hecht, 116 Wis.2d 605, 342 N.W.2d 721 (1984). Hecht had acted as the middleman between the buyer and the seller of cocaine. The court found the evidence sufficient to establish liability as either an aider and abettor or a conspirator. As to the conspiracy theory, the court cited Nutley for the two elements:

> (1) An agreement among two or more persons to direct their conduct toward the realization of a criminal objective.
>
> (2) Each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. Each must have an individual 'stake in the venture.'

The court found the evidence sufficient to show a tacit agreement to sell cocaine and an intent on Hecht's part that the actual sale be accomplished. As to "stake in the venture," the court observed:

> The defendant argues strenuously that he had no "stake in the venture." However, while evidence of such a "stake" may be persuasive of the degree of the party's involvement, lack of a "stake in the venture" does not absolve one of party to a crime liability. Krueger v. State, 84 Wis.2d 272, 286, 267 N.W.2d 602 (1978). It is not a third element to either of the theories of aiding and abetting liability or conspiracy. As we have stated above, we find the defendant's participation to such a degree as to support a finding of guilt under either theory, regardless of the presence or absence of such a stake. However, it is clear to this court that Hecht did believe that he had a "stake in the venture." . . .
>
> We believe that Hecht's testimony concerning his belief of a "stake" further supports the jury's finding that he consciously intended the sale, to ensure his collection of the $1,700, and is also indicative of his advanced degree of involvement in the entire venture.

4. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

5. Insert the appropriate number of elements from the uniform instruction for the crime charged.

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of a member of the conspiracy directly committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime. Thus, the phrase, "a member of the conspiracy," should be used in place of "the defendant."

7. The material in brackets should be added if the jury was instructed on withdrawal from a conspiracy. See § 939.05(2)(c) and Wis JI-Criminal 412.

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410 EXAMPLE PARTY TO CRIME: CONSPIRACY TO COMMIT BURGLARY

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends that the defendant was concerned in the commission of the crime of burglary as a member of a conspiracy to commit that crime.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime.

Definition of Being A Member of a Conspiracy

A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.

[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.]

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of burglary was committed and that the defendant was a member of a conspiracy to commit that crime.

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Statutory Definition of the Crime

Burglary, as defined in § 943.01 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements of burglary were present.

Elements of the Crime That the State Must Prove

1. A member of the conspiracy intentionally entered a building.
2. A member of the conspiracy entered the building without the consent of the person in lawful possession.
3. A member of the conspiracy knew that the entry was without consent.
4. A member of the conspiracy entered the building with intent to steal.

"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and intent to deprive the owner permanently of possession of the property. [It requires knowledge that the property belonged to another and knowledge that the person did not consent to the taking of the property.]

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant was a member of a conspiracy to commit burglary and the crime was committed by a member of the conspiracy [and that the defendant did not withdraw before the crime was committed], you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 410 EXAMPLE was originally published in 1994. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction illustrates the application of Wis JI-Criminal 410 to a case involving a conspiracy to commit burglary.

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411 PARTY TO CRIME: CONSPIRACY: THE CRIME CHARGED IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE INTENDED CRIME

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) as a member of a conspiracy to commit that crime.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime. A member of a conspiracy is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was a member of a conspiracy to commit the crime of (name intended crime), that (name charged crime) was committed in the pursuance of (intended crime), and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended crime).

Definition of Being A Member of a Conspiracy

A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime.[2] A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.[3]

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[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.]

First consider whether the defendant was a member of a conspiracy to commit the crime of (name intended crime).

Statutory Definition of the Intended Crime

(Name intended crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the intended crime).[4]

State's Burden of Proof – Intended Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[5] elements of (name intended crime) were present.

Elements of the Intended Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE INTENDED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "MEMBER OF THE CONSPIRACY" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION.[6]

Next consider whether the crime of (name charged crime) was committed.

Statutory Definition of the Charged Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state elements of the crime).[7]

State's Burden of Proof – Charged Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[8] elements of (name crime charged) were present.

Elements of the Charged Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "MEMBER OF THE CONSPIRACY" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION.[9]

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Natural and Probable Consequences

Finally, consider whether (name charged crime) was committed in pursuance[10] of (name intended crime) and under the circumstances was a natural and probable consequence of (name intended crime).[11]

A crime is a natural and probable consequence of another crime if, in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of (name charged crime) was likely to result from the commission of (name intended crime), then you may find that under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant was a member of a conspiracy to commit (name crime charged), that a member of the conspiracy committed the crime of (name charged crime) [and that the defendant did not withdraw before the crime was committed],[12] that (name charged crime) was committed in pursuance of (name charged crime) and was, under the circumstances, a natural and probable consequence of committing (name intended crime) you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 411 was originally published in 1994. A nonsubstantive editorial correction was made in 1996. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400, © 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of

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separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

This instruction is intended for the case where the defendant is alleged to be guilty as a party to a crime on the theory that the defendant was a member of a conspiracy to commit a crime, of which the charged crime is a natural and probable consequence. See §939.05(2)(c).

For an example applying a similar model (involving aiding and abetting and natural and probable consequences) to a case with first degree intentional homicide as a natural and probable consequence of armed robbery, see Wis JI-Criminal 406 EXAMPLE.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The description of a "member of a conspiracy" is based on the statement in § 939.31 which defines the inchoate crime of conspiracy. The conduct and agreement are the same in both situations. The only distinction is whether the crime is actually committed.

A person cannot be convicted under both § 939.31 for conspiracy and under § 939.05 as a party to a crime which is the objective of a conspiracy. § 939.72.

3. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." While such a requirement was cited with approval in State v. Nutley, 24 Wis.2d 527, 556, 129 N.W.2d 155 (1964), later decisions have concluded that a "stake in the venture" is not required. The leading cases are discussed briefly here.

In United States v. Falcone, 109 F.2d 579 (CCA2d, 1940), the defendant was a wholesaler who sold large quantities of sugar and 5-gallon cans to grocers who sold them to bootleggers. Quantities greatly increased when illegal stills were active. The court held there was no conspiracy:

> There are indeed instances of criminal liability of the same kind [as civil liability], where the law imposes punishment merely because the accused did not forbear to do that which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.

In Direct Sales Co. v. United States, 319 U.S. 703 (1943), the defendant was a wholesale drug distributor who sold great quantities of morphine through the mail to a doctor in a small town. Sales were so large and frequent that Direct Sales must have known that the drugs could not be legally dispensed. The court held that a conspiracy was established. The key distinction between his case and Falcone lies in the nature of the commodities: the morphine was incapable of further legal use except by compliance with rigid regulations.

> This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote,

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> and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.
>
> When the evidence discloses such a system, . . . there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy.

319 U.S. 703, 713.

The issue was addressed by the Wisconsin Supreme Court in State v. Hecht, 116 Wis.2d 605, 342 N.W.2d 721 (1984). Hecht had acted as the middleman between the buyer and the seller of cocaine. The court found the evidence sufficient to establish liability as either an aider and abettor or a conspirator. As to the conspiracy theory, the court cited Nutley for the two elements:

> (1) An agreement among two or more persons to direct their conduct toward the realization of a criminal objective.
>
> (2) Each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. Each must have an individual 'stake in the venture.'

The court found the evidence sufficient to show a tacit agreement to sell cocaine and an intent on Hecht's part that the actual sale be accomplished. As to "stake in the venture," the court observed:

> The defendant argues strenuously that he had no "stake in the venture." However, while evidence of such a "stake" may be persuasive of the degree of the party's involvement, lack of a "stake in the venture" does not absolve one of party to a crime liability. Krueger v. State, 84 Wis.2d 272, 286, 267 N.W.2d 602 (1978). It is not a third element to either of the theories of aiding and abetting liability or conspiracy. As we have stated above, we find the defendant's participation to such a degree as to support a finding of guilt under either theory, regardless of the presence or absence of such a stake. However, it is clear to this court that Hecht did believe that he had a "stake in the venture." . . .
>
> We believe that Hecht's testimony concerning his belief of a "stake" further supports the jury's finding that he consciously intended the sale, to ensure his collection of the $1,700, and is also indicative of his advanced degree of involvement in the entire venture.

4. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

5. Insert the appropriate number of elements from the uniform instruction for the crime charged.

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of a member of the conspiracy directly committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime. Thus, the phrase, "a member of the conspiracy," should be used in place of "the defendant."

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7. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

8. Insert the appropriate number of elements from the uniform instruction for the crime charged.

9. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of a member of the conspiracy directly committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime. Thus, the phrase, "a member of the conspiracy," should be used in place of "the defendant."

10. "In pursuance of" is taken directly from § 939.05(2)(c). It is defined as "a carrying out or putting into effect." American Heritage Dictionary of the English Language, Third Edition, 1992. Thus, the charged crime must be committed "in the carrying out of" the intended crime.

11. The Committee concluded that whether one crime is a "natural and probable consequence" of another is an issue of fact to be determined by reference to the circumstances of each case. This is consistent with the approach of the Wisconsin Supreme Court in State v. Ivy, 119 Wis.2d 591, 350 N.W.2d 622 (1984) (reversing 115 Wis.2d 645, 341 N.W.2d 408 (Ct. App. 1983)). Neither Ivy nor the other decisions dealing with the "natural and probable consequences" theory provide a definition of that term. The definition in the instruction was developed after extensive deliberation and review. It equates "natural and probable consequences" with foreseeability, evaluated from the point of view of one in the defendant's position at the time of the alleged offense. This type of definition is consistent with the use of the term in tort law:

> Natural and probable consequences. To some extent there are difficulties of language. Many courts have said that the defendant is liable only if the harm suffered is the "natural and probable" consequence of his act. These words frequently appear to have been given no more definite meaning than "proximate" itself. Strictly speaking, all consequences are "natural" which occur through the operation of forces of nature, without human intervention. But the word, as used, obviously appears not to be intended to mean this at all, but to refer to consequences which are normal, not extraordinary, not surprising in the light of ordinary experience. "Probable," if it is to add anything to this, must refer to consequences which were to be anticipated at the time of the defendant's conduct. The phrase therefore appears to come out as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance.

Prosser, The Law of Torts, 4th ed., p. 252 (West 1971).

If foreseeability is required in the context of negligence, the Committee reasoned that its equivalent, at a minimum, must be applicable in criminal cases employing the "natural and probable consequence" theory.

12. The material in brackets should be added if the jury was instructed on withdrawal from a conspiracy. See § 939.05(2)(c) and Wis JI-Criminal 412.

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412 PARTY TO CRIME: WITHDRAWAL FROM A CONSPIRACY

WHERE THERE IS EVIDENCE OF WITHDRAWAL, ADD THE FOLLOWING

You must also consider whether the defendant withdrew from the conspiracy before the crime was committed.

A person withdraws if (he) (she) voluntarily changes (his) (her) mind, no longer desires that the crime be committed, and notifies the other parties concerned of the withdrawal within a reasonable period of time before the commission of the crime so as to allow the others also to withdraw.

A person who withdraws from a conspiracy is not held accountable for the acts of the others and cannot be convicted of any crime committed by the others after timely notice of withdrawal.

COMMENT

Wis JI-Criminal 412 was originally published in 1994 and revised in 2005. This revision involved an addition to the Comment. It was approved by the Committee in October 2007.

The substance of this instruction is based on § 939.05(2)(c), which applies where a person is charged as a party to a completed crime committed by a member of a conspiracy of which the defendant is also a member. Subsection (2)(c) provides in part:

> This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

This withdrawal rule applies only to cases under § 939.05. Withdrawal is not a defense to the inchoate crime of conspiracy as defined in § 939.31. See Wis JI-Criminal 570, Comment.

The instruction on withdrawal should be added to the appropriate instruction at the point indicated in the text of that instruction. It is also recommended that there be an addition to the concluding paragraph

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summarizing the findings required for a guilty verdict to the effect that the defendant did not withdraw. The latter is also provided in the text of the appropriate instructions.

The Committee concluded that withdrawal should be handled in the same manner as other affirmative defenses under Wisconsin law. The burden of production is on the defendant to introduce or point to "some evidence" tending to show withdrawal. If that showing is made, the burden of persuasion is on the State to prove beyond a reasonable doubt that withdrawal did not occur. As to the general rules in Wisconsin relating to "affirmative defenses," see Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979) and State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983).

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415 PARTY TO CRIME: SOLICITATION TO COMMIT THE CRIME CHARGED

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by soliciting another to commit that crime. If a person solicits another to commit a crime and that crime is committed, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Solicitation

A person solicits the commission of a crime when that person advises, hires, counsels, or otherwise procures another to commit that crime.[2]

[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.][3]

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the crime of (name crime charged) was committed and that the defendant solicited another to commit that crime.

Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[4]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[5] elements of (name crime charged) were present.

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Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that (name of principal)[7] committed all _____[8] elements of (name crime charged) and that the defendant solicited (name of principal) to commit that crime [and did not withdraw before the crime was committed], you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 415 was originally published in 1994. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400, © 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

This instruction is for the case which is submitted to the jury solely on the theory that the defendant another person to commit the crime.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. "Solicitation" is used as the general term describing the conduct. It is defined by reference to ways "soliciting" may be accomplished set forth in § 939.05(2)(c).

3. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person committing the crime rather than by using "the defendant." In the party to crime

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case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be inserted in the blank and used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" in the first blank and "the person" or "that person" in the other blanks.

4. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

5. Insert the appropriate number of elements from the uniform instruction for the crime charged.

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of another person directly committing the crime rather than to use only "the defendant." In the party to crime case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a party to that crime.

If the name of the principal is known, it should be used throughout the instruction. If the case presents the unusual situation where the name of the principal is not known, use "another person" the first time reference is made and "the person" or "that person" for the other references.

7. If the name of the principal is known, it should be inserted in the blank. If the case presents the unusual situation where the name of the principal is not known, use "another person."

8. Insert the appropriate number of elements from the uniform instruction for the crime charged.

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418 [NOTE ON INSTRUCTIONS WITHDRAWN]

405 STATEMENT OF CO-CONSPIRATOR
410 STATEMENT OF CO-CONSPIRATOR; EVIDENCE PRESENTED THAT CONSPIRACY TERMINATED BEFORE STATEMENT WAS MADE
415 STATEMENT OF CO-CONSPIRATOR; EVIDENCE PRESENTED THAT CONSPIRACY TERMINATED BY WITHDRAWAL BEFORE STATEMENT WAS MADE

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 418, a withdrawal note, was approved by the Committee in October 1994 to record the withdrawal of three instructions, Wis JI-Criminal 405, 410, and 415.

Wis JI-Criminal 405 was originally published in 1962 and was revised in 1986 and 1987. The withdrawal of the instruction was approved by the Committee in June 1992.

Wis JI-Criminal 410 and 415 were originally published in 1962 and revised in 1986. Their withdrawal was approved by the Committee in October 1994. Because they existed only as add-ons to Wis JI-Criminal 405, they should have been withdrawn along with Wis JI-Criminal 405 in 1992.

Wis JI-Criminal 405 was intended to be used when a statement of a co-conspirator was introduced under § 908.01(4)(b)5., which provides that a statement is not hearsay if offered against a party and is a statement by a co-conspirator of the party made during the course and in furtherance of the conspiracy.

Wis JI-Criminal 405 implemented three rules:

(1) the decision whether the statement was made during a conspiracy is for the jury;
(2) the burden of proof is beyond a reasonable doubt; and
(3) the jury is not to consider the statement itself in trying to decide whether a conspiracy existed.

The Committee had been aware that the viability of these rules was open to serious question. Despite these questions, the Committee concluded that it did not have the authority to change the rule until the Wisconsin appellate courts explicitly did so in a published opinion. (The reasons for this conclusion were described in the Comment to Wis JI-Criminal 405, © 1987, and are reproduced below.)

The Wisconsin Court of Appeals has now made it clear that some, if not all, of the Wisconsin rule reflected in Wis JI-Criminal 405 is discarded. In State v. Whitaker, 167 N.W.2d 247, 481 N.W.2d 649 (Ct.

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App. 1992), the court held that § 901.04(1) of the Wisconsin Rules of Evidence "permits an out-of-court declaration by a party's alleged coconspirator to be considered by the trial court in determining whether there was a conspiracy." 167 Wis.2d at 263.

Whitaker did not specifically address the question whether the jury has any function to perform. But the Committee concluded that the proper procedure in Wisconsin now follows that approved by the United States Supreme Court under the Federal Rules of Evidence. In Bourjaily v. United States, 483 U.S. 171 (1987), the Court held that the admissibility of a co-conspirator's statement is for the trial court to decide, using a preponderance of the evidence standard, and considering the statement itself in determining whether a conspiracy existed at the time the statement was made. The trial court must be satisfied that the statement was made "in the course of and in furtherance of the conspiracy." § 908.01(4)(b)5.

The Confrontation Clause of the Sixth Amendment does not require a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, if those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E). United States v. Inadi, 475 U.S. 387 (1986). Wisconsin's § 908.01(4)(b)5 is identical to Federal Rule of Evidence 801(d)(2)(E). The Inadi rule was adopted for Wisconsin by State v. Webster, 156 Wis.2d 510, 485 N.W.2d 373 (Ct. App. 1990).

Nor does the Confrontation Clause require an additional showing of "independent indicia of reliability." No such inquiry is required when the evidence falls within a "firmly rooted hearsay exception." The co-conspirator exception is such an exception. Bourjaily v. United States, 483 U.S. 171 (1987); State v. Webster, 156 Wis.2d 510, 522, 485 N.W.2d 373 (Ct. App. 1990).

What follows is from the Comment to Wis JI-Criminal 405, © 1987, explaining the Committee's decision not to withdraw the instruction in the absence of an explicit appellate court decision.

The basis for giving an instruction like Wis JI-Criminal 405 is found in Schultz v. State, 133 Wis. 215, 225, 113 N.W. 428 (1907):

> In order that the statements and acts of alleged conspirators in the execution of the common purpose can be properly considered on the question of the guilt or innocence of the accused, it is not enough that the court has determined that a prima facie case of conspiracy has been made, but the jury must first be satisfied by the evidence that the conspiracy in fact existed. They cannot use the statements or acts for any purpose until they have determined this fact. They should have been so instructed in unmistakable language.

Schultz was cited with approval in State v. Meating, 202 Wis. 47, 53, 231 N.W. 263 (1930).

More recent cases discussing the issue have not reviewed jury instructions or discussed the necessity of giving an instruction like Wis JI-Criminal 405. See, for example, State v. Dorcey, 103 Wis.2d 152, 307 N.W.2d 612 (1981); Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978). There is some question about the continued validity of the rule calling for a jury finding on the existence of the conspiracy. In an unpublished decision, the Wisconsin Court of Appeals held that the procedure on which Wis JI-Criminal 405 is based is no longer the correct practice in Wisconsin. Rather, the existence of the conspiracy was held to be solely a question for the court. The decision (State v. Kmecik, District III, May 27, 1986), though recommended for publication, was not published and,

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therefore, cannot be cited as authority. Further, the decision did not review the applicable Wisconsin case law in detail or explicitly state that the case law was overruled. Instead, the decision appeared to rest on the proposition that under the new rules of evidence, specifically § 901.04(1), the existence of the conspiracy is a "preliminary question concerning the admissibility of evidence [that] shall be determined by the judge" and that this superseded the case law.

The United States Supreme Court recently addressed these questions in a case interpreting the Federal Rules of Evidence. In Bourjaily v. United States, 483 U.S. 171 (1987), the Court found no constitutional problems with a procedure under the Federal Rules that differs from the current Wisconsin practice in three important respects:

(1) Whether a statement was made during the course of and in furtherance of a conspiracy is a "preliminary question of fact" for the court to decide;

(2) in making this determination, the court may employ the "preponderance of the evidence" standard; and

(3) the court may consider the statement itself in deciding whether the conspiracy existed.

The Bourjaily decision interpreted Federal Rules of Evidence which are essentially the same as their Wisconsin counterparts. So Wisconsin appellate courts are free from federal constitutional constraints if they choose to reconsider the Wisconsin rule. While making the existence of the conspiracy solely a question for the judge may be a better rule on the merits, and one that would avoid the necessity for a possibly hard-to-follow instruction like Wis JI-Criminal 405, the Committee did not believe that the prior rule, embodied in decisions of the Wisconsin Supreme Court, could be abandoned without explicit judicial or statutory authority. The Committee further concluded that § 901.04(1) was not sufficient authority by itself in the absence of construction by an appellate court. [This conclusion is supported by the fact that, prior to Bourjaily, supra, the federal courts were not in agreement on whether this factual issue is to be decided by the judge or the jury. Practice under Federal Rule 801(d)(2)(E) is extensively discussed in Federal Rules of Evidence Manual, by Saltzburg and Redden. The specific issue of how much evidence of a conspiracy is required to justify submitting the statement to the jury is covered at pages 462-68 of that text.]

[The 1987 Comment concluded that given the absence of clear authority to remove Wis JI-Criminal 405, it was retained, based on the assumption that a preliminary finding of sufficient evidence to establish a conspiracy must be made by the trial court, with the ultimate finding of the existence of a conspiracy being for the jury.]

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420 CRIMINAL LIABILITY OF A CORPORATION

[The defendant] [One of the defendants] in this case is a Wisconsin corporation. A corporation is a legal entity that can act only through its agents.

(Name of defendant) is charged with committing the crime of (charged crime), on the basis that the crime was directly committed by (name of agent),[1] an agent of (name of defendant).

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of agent) committed the crime of (name charged crime).
2. (Name of agent) was an agent of (name of defendant).
3. (Name of agent) was acting within the scope of employment.

Statutory Definition of the Crime

The crime of (charged crime), as defined in § _____ [of the Criminal Code of Wisconsin],[2] is committed by one who

[LIST THE ELEMENTS OF THE CHARGED CRIME AS IDENTIFIED IN THE APPLICABLE UNIFORM INSTRUCTION. USE THE NAME OF THE ALLEGED AGENT IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.]

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Next consider whether (name of agent) was an agent of (name of defendant) and committed (charged crime) while acting within the scope of employment.

Meaning of "Agent"

Agents are officers, directors, employees, or other people who are authorized by a corporation to act for it.

Meaning of "Scope of Employment"

Agents are within the scope of employment when they perform acts they have the express or implied authority to perform and their actions benefit or are intended to benefit the interest of the corporation. When agents step aside from acts they are hired to perform and do something for their own reasons or for reasons not related to the business of the employer, their acts are outside the scope of employment.

[ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[A corporation may be responsible for the actions of its agent done within the scope of employment and to benefit the corporation, even though the conduct of the agent may be contrary to the corporation's actual instructions or stated policies. The existence of such instructions and policies, however, if any exist, may be considered by you in determining if the agent was acting within the scope of employment or to benefit the corporation.][3]

[ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[If you find that an act of an agent was not committed within the scope of the agent's employment or with intent to benefit the corporation, then you must consider whether the

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corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, having full knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct. A corporation is responsible for any act or omission approved by its agents.][4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that (name of agent) committed all the elements of the crime of (name charged crime), that (name of agent) was an agent of (name of defendant), and that (name of agent) was acting within the scope of employment, you should find (name of defendant) guilty.

If you are not so satisfied, you must find (name of defendant) not guilty.

COMMENT

Wis JI-Criminal 420 was originally published in 1962 and revised in 1987, 1995, and 1999. This revision was approved by the Committee in February 2005.

The 1995 revision of this instruction replaced three instructions: Wis JI-Criminal 420 CORPORATE LIABILITY: ACTS OF MANAGEMENT; Wis JI-Criminal 425 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES: STRICT LIABILITY CASES; Wis JI-Criminal 430 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES: OTHER THAN STRICT LIABILITY CASES. The text of each of those instructions was essentially the same, reflecting only that a different type of officer or employee was involved. The revised instruction is based on the premise that a corporation acts through its agents and that agents may be officers, directors, employees, and others who are authorized to act on its behalf. It will be a factual question in each case whether a particular person who directly committed the crime was an agent of the defendant corporation, but once that question is settled, the other requirements are the same regardless of the type of agent involved: the agent must have been acting within the scope of employment and with the effect or intent of benefitting the corporation.

The Committee recommends specifically identifying the culpable agent in the instruction. See footnote 1. The reported appellate decisions, in reviewing the sufficiency of the evidence, sometimes address two different theories of culpability. See the Knutson and Steenberg Homes decisions, summarized below, which discuss actions by employees that are directly connected with the harm caused and actions by higher-

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ranking corporate officials that failed to prevent the harm from taking place. A corporation may be criminally liable under either approach, but the instruction should clearly describe the conduct that is alleged to be the basis for the criminal charge. This instruction is drafted for the first situation: an identified agent of the corporation commits a crime while acting within the scope of employment.

The instruction is set up in a way that parallels the approach used for party to crime cases: the jury must determine whether someone directly committed the crime charged and then determine whether that person had a sufficient connection with the defendant corporation to extend liability to that corporation. See Wis JI-Criminal 400.

Until 1995, Wisconsin case law addressing the standard for criminal liability of a corporation was limited to a single case, though there were several reported decisions dealing with other legal issues in the context of a prosecution of a corporation. [See, for example, State v. Fettig, 172 Wis.2d 428, 493 N.W.2d 254 (Ct. App. 1992), a consolidated appeal with State v. Tankcraft, Inc.] Vulcan Last Co. v. State, 194 Wis. 636, 217 N.W. 412 (1928), was, for many years, the only Wisconsin decision directly stating the standard. More recently, its continued validity was confirmed in State v. Richard Knutson, Inc., 196 Wis.2d 86, 537 N.W.2d 420 (Ct. App. 1995), and State v. Steenberg Homes, Inc., 223 Wis.2d 511, 589 N.W.2d 668 (Ct. App. 1998). This instruction is believed to be consistent with the principles established by these cases. The decisions are summarized below.

Vulcan Last: The Vulcan Last Company wanted the city of Crandon to extend city water service to its plant. A Vulcan employee who sat on the city council voted against the bond issue that would finance the water service extension. The day after the council vote, the employee was fired by a supervisor who assembled all the employees and told them that any man who voted against the interests of the company would be discharged.

The corporation was charged with violating a statute that prohibited employers from attempting "to influence a qualified voter to give or withhold his vote at an election." [The statute still exists; see, § 103.18.] The Wisconsin Supreme Court affirmed the conviction, using the case to adopt the then-modern view that corporations could be convicted of a crime. The relevant legal rule was stated concisely:

> Corporations must of necessity act through their agents. When these agents act within the scope of their authority their acts are the acts of the corporation, for which the corporation is liable both civilly and criminally. If the acts are within the scope of the authority of the agent, the corporation is liable criminally for the act although the act may not have been expressly authorized by the corporation, even if the corporation has expressly forbidden its agent to act in the manner that made it answerable to punishment under the criminal law.

194 Wis. 636, 643.

Vulcan Last indicates that the crux of the matter is whether the agent was acting within "the scope of employment." That is the issue emphasized in the revised instruction.

Until 1995, the part of the Vulcan Last decision quoted above had been cited in only two cases: one a civil case on an unrelated point; and, the other a criminal case where a corporation was held responsible for a fine imposed on an overweight truck. State v. Dried Milk Products Cooperative, 16 Wis.2d 357, 114 N.W.2d 412 (1962).

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Knutson: Richard Knutson, Inc., undertook the construction of a sanitary sewer line for the city of Oconomowoc. A backhoe operator employed by the company struck a power line with the boom of the backhoe. Another member of the work crew who was trying to attach a chain to the backhoe's bucket was instantly electrocuted. The corporation was charged with negligent homicide in violation of § 940.10.

In affirming the conviction, the court of appeals confirmed that the standard set forth in Vulcan Last continues to be valid. The court's consideration of the issue was tied in with the question whether a corporation was covered by § 940.10 which defines the crime in terms of "whoever causes the death of another human being . . ." [Emphasis added.] The defendant argued that in the context of this phrase, "whoever" necessarily refers to a human being. The court of appeals rejected this argument, relying in part on the fact that prior to the adoption of the 1955 Criminal Code, a corporation could be held criminally liable, citing Vulcan Last. The court reiterated the general rule that "[a] corporation acts of necessity through its agents . . . ; therefore, the only way a corporation can negligently cause the death of a human is by the act of its agent — another human." 196 Wis.2d 86, 105. One of the citations offered as support for this proposition was Wis JI-Criminal 430 [copyright 1987], which was based on Vulcan Last, and which is now replaced by Wis JI-Criminal 420.

Steenberg Homes: An employee of Steenberg Homes, Inc., was driving a Steenberg tractor-trailer when the trailer disengaged and struck three bicyclists, killing two of them. Neither the driver nor his supervisor/trainer had attached the safety chains between the tractor and the trailer, allowing the trailer to disengage. The corporation was convicted of two counts of homicide by negligent operation of a vehicle in violation of § 940.10.

In affirming the convictions, the court relied on several substantive rules, all derived from Vulcan Last:

> A corporation can be held liable for the acts of its employees committed within the scope of employment. . . . Employees act within the scope of employment when they perform acts which they have express or implied authority to perform and their actions benefit or are intended to benefit the employer. An employer can be held responsible for the acts of an employee performed within the scope of employment, even though the conduct of the employee is contrary to the employer's instructions or stated policies.

223 Wis.2d 511, 520.

1. The Committee recommends specifically identifying the culpable agent in the instruction. The reported appellate decisions, in reviewing the sufficiency of the evidence, have addressed two different theories of culpability. See the Knutson and Steenberg Homes decisions, summarized above, which discuss actions by employees that are directly connected with the harm caused and actions by higher-ranking corporate officials that failed to prevent the harm from taking place.

For example, in Knutson, a death was caused when the operator of a backhoe struck a power line with the backhoe's boom. The corporation's liability could be based on two theories:

> (1) the backhoe operator was the agent, the operator was criminally negligent, that criminal negligence caused the victim's death, and the corporation is responsible for the criminal act of its agent, who was acting within the scope of employment; or,

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(2) the corporation, acting through its officers, was criminally negligent in failing to have in place safety precautions that would have prevented the death.

In Steenberg Homes, two deaths were caused when a semitrailer detached and struck bicyclists. Again, two theories could support the corporation's liability:

(1) the truck driver, an agent of the corporation, was criminally negligent in failing to double check the proper attachment of the safety chains; or,

(2) the corporation, acting through its officers, was criminally negligent in failing to have in place safety procedures that would have assured proper attachment and checking of the safety chains.

A corporation may be criminally liable under either approach, but the instruction should clearly describe the conduct that is alleged to be the basis for the criminal charge. This instruction is drafted for the first situation: an identified agent is charged with committing a crime while acting within the scope of employment. If the charge is based on the failure to have proper safety procedures in place, an instruction on omission liability may be required. On omission liability generally, see State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), and State ex rel. Cornellier v. Black, 144 Wis.2d 745, 425 Wis.2d 21 (1988).

2. Use the phrase in brackets only if the charge is for a crime defined in the Criminal Code (Chapters 939 - 950, Wis. Stats.) With crimes allegedly committed by corporations, it may be common for charges to be based on offenses defined outside the Criminal Code, such as environmental regulations, hazardous waste regulations, etc.

3. United States v. Basic, 711 F.2d 570, 572-73 (4th Cir. 1983); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979).

4. See Wis JI-Civil 4015, Agency: Ratification. Also see Jury Instructions of the Seventh Circuit, No. 5.04 (West, 1980).

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425 CORPORATE LIABILITY: ACTS OF EMPLOYEES: STRICT LIABILITY

430 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES

INSTRUCTIONS WITHDRAWN

COMMENT

Wis JI-Criminal 425 and 430 were originally published in 1966 and revised in 1987. They were withdrawn in 1995 when Wis JI-Criminal 420 was revised to be usable for the situations formerly covered by these instructions. See the Comment to Wis JI-Criminal 420.

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435 LIABILITY FOR THE ACTS OF ANOTHER; AUTHORIZATION OR ACQUIESCENCE

The defendant is charged with committing the crime of (charged crime) by authorizing or acquiescing in the commission of that crime by another person, whose activities the defendant had a duty to direct or supervise.

Before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the crime of (charged crime) was committed by a person whose activities the defendant had a duty to direct or supervise and that the defendant authorized or acquiesced in such acts.

(Charged crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (summarize the elements of the charged crime).[1] The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[2] elements of (charged crime) were present.

[CONTINUE WITH EACH OF THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTION, OMITTING THE LAST TWO PARAGRAPHS. USE THE NAME OF THE PERSON WHO DIRECTLY COMMITTED THE CRIME IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE PERSON" OR "THE OTHER PERSON."][3]

Next consider whether (name of person) was a person whose activities the defendant had a duty to direct or supervise.

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Finally, consider whether the defendant (authorized) (acquiesced in) the acts allegedly committed by (name of person). This requires that (charged crime) was committed by (name of person) with the knowledge of the defendant and either with the defendant's consent or without the defendant's objection and efforts to prevent the acts.

If you are satisfied beyond a reasonable doubt from the evidence in this case that (name of person) (summarize the elements of the charged crime), that the defendant had a duty to direct or supervise (name of person), and that the defendant knew (name of person) committed the acts and (authorized) (acquiesced in) the acts allegedly committed by (name of person), you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 435 was originally published in 1966 and reviewed and republished without change in 1987. This revision was approved by the Committee in May 1995.

This instruction deals with the individual liability of a person for crimes committed by one whom the person has a duty to direct or supervise. Though such situations will commonly arise in the corporate setting, this instruction deals with the criminal liability of individuals, not the liability of corporations. Regarding the latter, see Wis JI-Criminal 420.

There have been no Wisconsin appellate cases dealing with the substance of the type of liability addressed by this instruction from the time of its original publication. It was revised in 1995 in an attempt to explain the basis of liability more clearly and to integrate the elements of the underlying crime. The revised instruction is set up in a way that parallels the approach used for party to crime cases: the jury must determine whether someone directly committed the crime charged and then determine whether that person had a sufficient connection with the defendant to extend liability to the defendant. See Wis JI-Criminal 400.

The rule of liability in the above instruction is illustrated by the case of State ex rel. Kropf v. Gilbert, 213 Wis. 196, 251 N.W. 478 (1933). The question in that case concerned the liability of certain corporate officers for embezzlement. There was no evidence that the officers in question expressly authorized the embezzlement, but there was evidence that they knew what was going on and made no effort to stop it. The court said that cases dealing with liability on account of aiding and abetting are not

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on point. Those cases generally hold that failure to take affirmative action to prevent a crime even though one could easily do so does not constitute aiding and abetting. See Connaughty v. State, 1 Wis. 143 (1853). Furthermore, the court distinguished cases which dealt with employees who carried out orders of superior officers. Those cases generally hold that the employee is not liable, various reasons being given for that conclusion, such as the fact that they have no power to control the affairs of the corporation or that they were in no sense advancing their own personal interests. See Weber v. State, 190 Wis. 257, 208 N.W. 923 (1926), and Kralovetz v. State, 191 Wis. 374, 211 N.W. 277 (1926). While the results reached in the various cases discussed above are correct, the analysis should proceed on the basis of whether there is a legal duty to act under the circumstances of the particular case. A person ordinarily does not have a legal duty to interfere to prevent a crime of violence from being committed [but see § 940.34, Duty To Aid Victim or Report Crime], and, therefore, he may stand by and acquiesce in the commission of the crime without being guilty as an aider and abetter on account of his mere presence and failure to take affirmative action. An employee of a corporation does not have a duty to manage the affairs of the corporation, and, therefore, he does not incur criminal liability simply because he fails to take affirmative action to prevent improper things from being done. Managerial officers, however, have such a duty and, therefore, guilt may be posited on mere acquiescence in the acts of another. See Carolene Products Co. et al. v. United States, 140 F.2d 61 (4th Cir. 1944).

1. Here summarize the definition of the charged crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

2. Insert the appropriate number of elements from the uniform instruction for the crime.

3. The primary change required in integrating the instruction for the charged crime is to phrase it in terms of another person committing the crime rather than by using "the defendant." In this case, it is the other person who directly commits the crime; "the defendant" is the person whose liability depends on being a person with a duty to supervise the person who directly commits the crime.

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440 LIABILITY FOR ACTS OF ANOTHER: ACTS OF AGENT OR SERVANT: STRICT LIABILITY CASES

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 440 was originally published in 1966 and reviewed and republished with an updated comment in 1987. The withdrawal of the instruction was approved by the Committee in May 1995.

This instruction dealt with the individual liability of a person for crimes committed by the person's employee when the crime is committed within the scope of employment. Though such situations will commonly arise in the corporate setting, the instruction dealt with the criminal liability of individuals, not the liability of corporations. Regarding the latter, see Wis JI-Criminal 420.

A footnote to the 1966 version of the instruction indicated that the "instruction is intended for those cases where, by statutory language or by judicial interpretation thereof, an employer is held strictly liable for the acts of an agent or servant." Because it is not clear when such strict liability situations exist, the Committee decided the instruction should be withdrawn.

The original instruction was based on an old line of cases that had recognized this type of liability in liquor regulation cases. See Olson v. State, 143 Wis. 413, 127 N.W. 975 (1910); Scott v. State, 171 Wis. 487, 177 N.W. 615 (1920); and State v. Grams, 241 Wis. 493, 6 N.W.2d 191 (1942). The rule in these cases was reaffirmed in State v. Beaudry, 123 Wis.2d 40, 365 NW.2d 593 (1985). Beaudry affirmed the conviction of the agent of a corporation for a liquor law violation committed by a bartender without the defendant's knowledge and directly contrary to the defendant's instructions.

As the court noted in Beaudry, it was approving a standard for both "vicarious" and "strict" liability: liability is "vicarious" in that it is derived from a violation directly committed by someone else; it is "strict" in the sense that no mental state is required. The court cited several factors in support of its conclusion:

1) the sale of alcohol beverages is highly regulated by statutes creating a strict liability "public welfare" offense;

2) the offense is a misdemeanor, punished by a fine and relatively short period of imprisonment;

3) it will often be difficult to prove that the agent was negligent in hiring or supervising the employee, or knew about or authorized the employee's violation of the law; and,

4) the number of prosecutions may be large so that the legislature would want to relieve the prosecution of the task of proving the employer knew of or authorized the violation or was negligent.

[Beaudry also referred to JI 440, apparently with approval, as to the definition of "scope of employment."]

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Shortly after the Beaudry case was decided, § 125.115 was created. [See 1985 Wisconsin Act 47, effective date: November 5, 1985.] It provides as follows:

125.115 Responsibility for commission of a crime.

(1) A person may be convicted of the commission of a crime under this chapter only if the criteria specified in s. 939.05 exist.

(2) This section does not apply to civil forfeiture actions for violation of any provision of this chapter or any local ordinance in conformity with any provision of this chapter.

It is believed that the enactment of this statute was intended to "overrule" the Beaudry decision, as far as criminal violations of the alcohol beverage laws are concerned.

Because the creation of § 125.115 eliminated strict liability for actions of an agent in the single situation where it had clearly been recognized, the Committee concluded that the instruction should be withdrawn.

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460 CLOSING INSTRUCTION

Now, members of the jury, the duties of counsel and the court have been performed. The case has been argued by counsel. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors, selected for this important duty. You will not be swayed by sympathy, prejudice, or passion. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and, as upright citizens, to render a just and true verdict.

You are to decide only whether the defendant is guilty or not guilty of the offense[s] charged. Any consequences of your verdict are matters for the court alone to decide and must not affect your deliberations.

[Give instructions on the verdicts submitted.]

COMMENT

Wis JI-Criminal 460 was originally published in 1962 and republished without change in 1994 and 2000. This revision was approved by the Committee in July 2009; it added the last two sentences regarding consequences of the verdict.

See Wis JI-Criminal 465 for a shorter, less formal closing.

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465 CLOSING INSTRUCTION: OPTIONAL SHORT FORM

You are to decide this case fairly and impartially, without fear or favor, and without passion or prejudice.

You are to decide only whether the defendant is guilty or not guilty of the offense[s] charged. Any consequences of your verdict are matters for the court alone to decide and must not affect your deliberations.

[Give instructions on the verdicts submitted.]

COMMENT

Wis JI-Criminal 465 was originally published in 1962. It was republished without change in 1994 and 2000. This revision was approved by the Committee in July 2009; it added the last two sentences regarding consequences of the verdict.

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480 VERDICTS SUBMITTED FOR ONE DEFENDANT: SINGLE COUNT

The following two[1] forms of verdict will be submitted to you for your consideration concerning the charges against the defendant, (name of defendant) .

One reading: "We, the jury, find the defendant, (name of defendant) , guilty of (offense charged) ,[2] as charged in the (information) (complaint)."[3]

And the other reading: "We, the jury, find the defendant, (name of defendant) , not guilty."

It is for you to determine which one of the forms of verdict submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 480 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called "penalty enhancers" that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**; Wis JI-Criminal 994, **CONCEALING IDENTITY**; and Wis JI-Criminal 996 and 996.1, **SELECTING THE PERSON AGAINST WHOM A CRIME IS COMMITTED** (or, **THE PROPERTY DAMAGED) BECAUSE OF RACE, RELIGION, ETC**. See the cited instructions for suggested additions to the verdict.

2. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

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482 VERDICTS SUBMITTED FOR ONE DEFENDANT: SINGLE COUNT: LESSER INCLUDED OFFENSE

The following three forms of verdict[1] will be submitted to you concerning the charges against the defendant, (name of defendant).

One reading: "We, the jury, find the defendant, (name of defendant), guilty of (offense charged),[2] as charged in the information."[3]

Another reading: "We, the jury, find the defendant, (name of defendant), guilty of (included offense),[4] in violation of § ____ of the Criminal Code of Wisconsin, at the time and place charged in the information."[5]

And the third reading: "We, the jury, find the defendant, (name of defendant), not guilty."

It is for you to determine which one of the forms of verdict submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 482 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000. This revision was approved by the Committee in February 2012; it involved updating the Comment.

This instruction calls for submitting three verdicts in the single count, single lesser included offense, case: guilty of the charged crime, guilty of the lesser included crime, and not guilty. See Wis JI-Criminal 485 for a case involving two counts and lesser included offenses.

In State v. Hansbrough, 2011 WI App 79, 334 Wis.2d 237, 797 N.W.2d 887, the defendant was found guilty of felony murder as a lesser included offense in a case where he was charged with first degree intentional homicide. He contended that he should receive a new trial because the trial court did not include a "not guilty" verdict form for felony murder. The court of appeals held that this was error, but harmless, "not structural," error. The offense instruction for felony murder did include the usual statement that "if you

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are not so satisfied, you must find the defendant not guilty." The problem would have been avoided if the procedure recommended in Wis JI-Criminal 482 had been followed.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In those cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. Here insert the short title of the included offense. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

5. See note 3, supra.

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484 VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS: SEPARATE VERDICT ON EACH COUNT REQUIRED

The following four forms of verdict[1] will be submitted to you concerning the charges against the defendant, (name of defendant) .

Count One

One reading: "We, the jury, find the defendant, (name of defendant) , guilty of (offense charged) ,[2] as charged in Count One of the (information) (complaint)."[3]

Another reading: "We, the jury, find the defendant, (name of defendant) , not guilty of (offense charged) ,[4] as charged in the Count One of the (information) (complaint)."

Count Two

Another reading: "We, the jury, find the defendant, (name of defendant) , guilty of (offense charged) ,[5] as charged in Count Two of the (information) (complaint)."[6]

Another reading: "We, the jury, find the defendant, (name of defendant) , not guilty of (offense charged) ,[7] as charged in Count Two of the (information) (complaint)."

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.[8]

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COMMENT

Wis JI-Criminal 484 was originally published in 1962 and revised in 1979, 1990, 1991, and 1992. It was republished without change in 2000. This revision was approved by the Committee in February 2012; it made nonsubstantive changes in the text and updated footnote 1.

If there are numerous counts alleged to have been committed on different dates, it is best to specify the alleged offenses and the dates of the alleged commission in the verdicts to keep the jury from becoming confused, especially since the state need not prove the exact time of the commission, and the jury is so instructed.

This instruction calls for submitting four verdicts in the two count case: guilty and not guilty for each count. See Wis JI-Criminal 485 for a case involving two counts and lesser included offenses.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. See note 2, supra.

5. See note 2, supra.

6. See note 3, supra.

7. See note 2, supra.

8. The last two sentences have been added for the situation where joinder of charges, while proper, exposes the defendant to considerable prejudice in that the jury may use the fact of being charged with one offense as proof that the other offense was committed.

In Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975), the defendant was charged with burglary and obstructing an officer. The offenses were joined in a single information and were tried at the same time. The

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supreme court held that the failure to deliver a proper cautionary instruction on the prejudicial effect of such joinder caused a miscarriage of justice requiring a new trial.

The trial judge in Peters gave Instruction No. 145, Information Not Evidence. This did not go far enough. An instruction was needed that advised the jury that it could not use evidence relating to making false statements to an officer to find the defendant guilty of the crime of burglary. "Such a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on the obstructing an officer count as sufficient in itself to find the defendant guilty of burglary." Peters, supra at 32.

The decision also recommends an instruction in a case from the 7th Circuit: United States v. Pacente, 503 F.2d 543 (7th Cir. 1974). It reads as follows:

> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . .

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485 VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS: LESSER INCLUDED OFFENSE ON EACH COUNT

Six forms of verdict[1] will be submitted to you concerning the charges against the defendant, (name of defendant).

Count One

As to Count One, three forms of verdict will be submitted, one reading: "We, the jury find the defendant, (name of defendant), guilty of (offense charged),[2] as charged in Count One of the information."[3]

Another reading: "We, the jury find the defendant, (name of defendant), guilty of (included offense),[4] in violation of § _____ of the Criminal Code of Wisconsin, at the time and place charged in Count One of the information."[5]

And a third reading: "We, the jury, find the defendant, (name of defendant), not guilty as to Count One."

Count Two

As to Count Two, three forms of verdict will be submitted, one reading: "We, the jury find the defendant, (name of defendant), guilty of (offense charged),[6] as charged in Count Two of the information."[7]

Another reading: "We, the jury find the defendant, (name of defendant), guilty of (included offense),[8] in violation of § _____ of the Criminal Code of Wisconsin, at the time and place charged in Count Two of the information."[9]

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And a third reading: "We, the jury, find the defendant, (name of defendant), not guilty as to Count Two."

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses submitted to you. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.[10]

COMMENT

Wis JI-Criminal 485 was approved by the Committee in February 2012.

This instruction is drafted for the case involving two counts, with a lesser included offense for each count. It calls for submitting three verdicts for each count: guilty of the charged crime; guilty of the lesser included crime; and, not guilty as to that count.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In those cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142

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N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. See note 2, supra.

5. See note 3, supra.

6. See note 2, supra.

7. See note 3, supra.

8. See note 2, supra.

9. See note 3, supra.

10. The last two sentences have been added for the situation where joinder of charges, while proper, exposes the defendant to considerable prejudice in that the jury may use the fact of being charged with one offense as proof that the other offense was committed.

In Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975), the defendant was charged with burglary and obstructing an officer. The offenses were joined in a single information and were tried at the same time. The supreme court held that the failure to deliver a proper cautionary instruction on the prejudicial effect of such joinder caused a miscarriage of justice requiring a new trial.

The trial judge in Peters gave Instruction No. 145, Information Not Evidence. This did not go far enough. An instruction was needed that advised the jury that it could not use evidence relating to making false statements to an officer to find the defendant guilty of the crime of burglary. "Such a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on the obstructing an officer count as sufficient in itself to find the defendant guilty of burglary." Peters, supra at 32.

The decision also recommends an instruction in a case from the 7th Circuit: United States v. Pacente, 503 F.2d 543 (7th Cir. 1974). It reads as follows:

> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . .

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486 VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 486 was originally published in 1962 and revised in 1979. It was withdrawn in 1990.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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490 VERDICTS SUBMITTED FOR MULTIPLE DEFENDANTS: SINGLE COUNT

The following two[1] forms of verdict will be submitted to you concerning the charges against each of the defendants.

[IN LIEU OF THE PROCEDURE FOLLOWED BELOW, THE COURT MAY READ EACH SET OF VERDICTS FOR EACH DEFENDANT.]

One reading: "We, the jury, find the defendant," as named in the verdict,[2] "guilty of (offense charged),[3] as charged in the (information) (complaint)."[4]

The other reading: "We, the jury, find the defendant," as named in the verdict,[5] "not guilty."

It is for you to determine which one of the forms of verdict submitted for each defendant you will bring in as your verdict regarding that defendant.

COMMENT

Wis JI-Criminal 490 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called "penalty enhancers" that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**; Wis JI-Criminal 994, Concealing Identity; and Wis JI-Criminal 996 and 996.1, **SELECTING THE PERSON AGAINST WHOM A CRIME IS COMMITTED** (or, **THE PROPERTY DAMAGED) BECAUSE OF RACE, RELIGION, ETC.** See the cited instructions for suggested additions to the verdict.

2. The words "as named in the verdict" should be read to the jury in lieu of the defendant's name and only one set of verdicts need be read. This procedure eliminates repetition, which is not of too much

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concern where there are only two defendants and a single offense charged. But where there are more than two defendants or more than one or two counts, this procedure will save time.

3. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

4. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

5. See note 2, supra.

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492 VERDICTS SUBMITTED FOR MULTIPLE DEFENDANTS: SINGLE COUNT: INCLUDED OFFENSE

The following three[1] forms of verdict will be submitted to you concerning the charges against each of the defendants.

[IN LIEU OF THE PROCEDURE FOLLOWED BELOW, THE COURT MAY READ EACH SET OF VERDICTS FOR EACH DEFENDANT.]

One reading: "We, the jury, find the defendant," as named in the verdict,[2] "guilty of (offense charged),[3] as charged in the information."[4]

Another reading: "We, the jury, find the defendant," as named in the verdict,[5] "guilty of (included offense),[6] in violation of § _____ of the Criminal Code of Wisconsin, at the time and place charged in the information."[7]

And a third reading: "We, the jury, find the defendant," as named in the verdict,[8] "not guilty."

It is for you to determine which one of the forms of verdict submitted for each defendant you will bring in as your verdict regarding that defendant.

COMMENT

Wis JI-Criminal 492 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called "penalty enhancers" that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**; Wis JI-Criminal 994, **CONCEALING**

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IDENTITY; and Wis JI-Criminal 996 and 996.1, **SELECTING THE PERSON AGAINST WHOM A CRIME IS COMMITTED** (or, **THE PROPERTY DAMAGED) BECAUSE OF RACE, RELIGION, ETC.** See the cited instructions for suggested additions to the verdict.

2. The words "as named in the verdict" should be read to the jury in lieu of the defendant's name and only one set of verdicts need be read. This procedure eliminates repetition, which is not of too much concern where there are only two defendants and a single offense charged. But where there are more than two defendants or more than one or two counts, this procedure will save time.

3. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

4. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In such cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

5. See note 2, supra.

6. Here insert the short title of the included offense. See note 3, supra.

7. See note 4, supra.

8. See note 2, supra.

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494 VERDICTS SUBMITTED FOR MULTIPLE DEFENDANTS: TWO COUNTS: SEPARATE VERDICT ON EACH COUNT REQUIRED

The following four[1] forms of verdict will be submitted to you concerning the charges against each of the defendants.

[IN LIEU OF THE PROCEDURE FOLLOWED BELOW, THE COURT MAY READ EACH SET OF VERDICTS FOR EACH DEFENDANT.]

One reading: "We, the jury, find the defendant," as named in the verdict,[2] "guilty of (offense charged),[3] as charged in the first count of the (information) (complaint)."[4]

Another reading: "We, the jury, find the defendant," as named in the verdict,[5] "guilty of (offense charged),[6] as charged in the second count of the (information) (complaint)."[7]

A third reading: "We, the jury, find the defendant," as named in the verdict,[8] "not guilty of the crime charged in the first count of the (information) (complaint)."

And a fourth reading: "We, the jury, find the defendant," as named in the verdict,[9] "not guilty of the crime charged in the second count of the (information) (complaint)."

It is for you to determine whether each of the defendants is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.[10]

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COMMENT

Wis JI-Criminal 494 was originally published in 1962 and revised in 1979, 1990, 1991, and 1992. It was republished without change in 2000.

If there are numerous counts alleged to have been committed on different dates, it is best to specify the alleged offenses and the dates of the alleged commission in the verdicts to keep the jury from becoming confused, especially since the state need not prove the exact time of the commission, and the jury is so instructed.

1. Additions to the verdict are required in several situations. In theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. Wis JI-Criminal 1441A provides a recommended instruction for these findings. There are also several so-called penalty enhancers that provide for an increased penalty if specified facts are found. See, for example, Wis JI-Criminal 990, **USING A DANGEROUS WEAPON**, and Wis JI-Criminal 994, **CONCEALING IDENTITY**. See the cited instructions for suggested additions to the verdict.

2. The words "as named in the verdict" should be read to the jury in lieu of the defendant's name and only one set of verdicts need be read. This procedure eliminates repetition, which is not of too much concern where there are only two defendants and a single offense charged. But where there are more than two defendants or more than one or two counts, this procedure will save time.

3. Here should be inserted the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

In some cases, a more specific reference to the facts of the crime may be necessary. Such a case may be illustrated by the facts in State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992). The information involved multiple counts, each generally charging "having sexual contact in September 1989." Evidence was presented at trial that was inconsistent with regard to the number of occasions on which crimes were allegedly committed and with regard to the nature of the acts that took place on each occasion. The verdicts submitted were also general and failed to specify the acts that were the basis for each charge.

The court in Marcum held that "the jury must be presented with verdict forms that adequately distinguish each separately charged crime." 166 Wis.2d 908, 923. The failure to do so creates a problem of jury unanimity under the sixth amendment and a problem of due process under the fifth amendment. The problem in Marcum could have been cured by referring in the verdict to the facts alleged to constitute each crime.

4. It is important that the reference, "as charged in the (information) (complaint)," appear in the verdict. The Committee feels that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

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5. See note 2, supra.

6. See note 3, supra.

7. See note 4, supra.

8. See note 2, supra.

9. See note 2, supra.

10. The last two sentences have been added for the situation where joinder of charges, while proper, exposes the defendant to considerable prejudice in that the jury may use the fact of being charged with one offense as proof that the other offense was committed.

In Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975), the defendant was charged with burglary and obstructing an officer. The offenses were joined in a single information and were tried at the same time. The supreme court held that the failure to deliver a proper cautionary instruction on the prejudicial effect of such joinder caused a miscarriage of justice requiring a new trial.

The trial judge in Peters gave Instruction No. 145, Information Not Evidence. This did not go far enough. An instruction was needed that advised the jury that it could not use evidence relating to making false statements to an officer to find the defendant guilty of the crime of burglary. "Such a cautionary instruction must be given in clear and certain terms, because otherwise there is a strong likelihood that the jury will regard the evidence on the obstructing an officer count as sufficient in itself to find the defendant guilty of burglary." Peters, supra at 32.

The decision also recommends an instruction in a case from the 7th Circuit: United States v. Pacente, 503 F.2d 543 (7th Cir. 1974). It reads as follows:

> Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . .

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496 VERDICTS SUBMITTED FOR TWO DEFENDANTS: TWO COUNTS: CONVICTION FOR ONLY ONE PROPER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 496 was originally published in 1962 and revised in 1979. It was withdrawn in 1990.

This instruction dealt with a case where two charges were submitted to the jury but conviction for only one was proper. Because such cases seldom, if ever, come up in practice, the Committee concluded that the instruction was no longer necessary and should be withdrawn.

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515 UNANIMOUS VERDICT AND SELECTION OF PRESIDING JUROR

This is a criminal, not a civil, case; therefore, before the jury may return a verdict which may legally be received, the verdict must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict.

When you retire to the jury room, select one of your members to preside over your deliberations. The presiding juror's vote is entitled to no greater weight than the vote of any other juror.

If you need to communicate with the court while you are deliberating, send a note through the bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you communicate with the court only by a written note. If you have questions, the court will talk with the attorneys before answering so it may take some time. You should continue your deliberations while you wait for an answer. The court will answer any questions in writing or orally here in open court.[1]

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside.

After you have reached a verdict:

- The presiding juror will notify the bailiff that a verdict has been reached.
- Everyone will return to the courtroom.
- The verdict will be read into the record in open court.

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• The court may ask each of you if you agree with the verdict.[2]

Swear the officer.

COMMENT

Wis JI-Criminal 515 was originally published in 1962 and revised in 1983 and 2001. This revision was approved by the Committee in July 2011; it added paragraphs relating to getting assistance from the court and information about returning the verdict.

The material added to the text in 2011 was originally published as part of Wis JI-Criminal 521, which has been withdrawn.

For a supplementary instruction advising of the need to be unanimous with regard to a particular criminal act, see Wis JI-Criminal 517.

The jury unanimity instruction should always be given. However, the failure to do so can be cured by polling the jury, thereby assuring that the verdict was, in fact, unanimous. State v. Kircher, 189 N.W.2d 392, 398-401, 525 N.W.2d 788 (Ct. App. 1994).

1. See State v. Anderson, 2006 WI 77 , 291 Wis.2d 673, 717 N.W.2d 74. The decision reversed a conviction for first degree sexual assault of a child based on several prejudicial errors made by the trial judge in connection with jury deliberations:

• allowing the jury to play a videotape of a pretrial interview of the victim in the jury room rather than on the record in open court;
• communicating with the jury during deliberations outside the presence of the defendant and without notice to or consultation with the defendant;
• communicating with the jury outside the presence of defense counsel and without notice to or consultation with defense counsel;
• failing to preserve a record of those communications; and,
• refusing the jury's requests to have portions of the testimony read.
2006 WI 77, ¶126.

2. Also see, Wis JI-Criminal 522, Polling The Jury.

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515A FIVE-SIXTHS VERDICT AND SELECTION OF PRESIDING JUROR: FORFEITURE ACTIONS

In this case, the law provides that the verdict must be agreed to by five-sixths or more of the jury. Any verdict returned by the jury shall be agreed to by at least (five) (ten) of the jurors. I ask you to try to be unanimous if you can.

When you retire to the jury room, select one of your members to preside over your deliberations. That person's vote is entitled to no greater weight than the vote of any other juror.

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside. At the foot of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names. Either the blank lines or the space below them may be used for that purpose.

Swear the officer.

COMMENT

This instruction was originally published as Wis JI-Criminal 515.1 in 1993, replacing Wis JI-Criminal 2055, which was originally published in 1962. This revision was approved by the Committee in December 2000 and involved adoption of a new format and nonsubstantive changes to the text. It renumbered the instruction Wis JI-Criminal 515A.

For discussion of the five-sixths verdict in civil cases, see Wis JI-Civil 180.

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517 JURY AGREEMENT: EVIDENCE OF MORE THAN ONE ACT INTRODUCED TO PROVE ONE CHARGE

[USE IN APPROPRIATE CASES.][1]

The defendant is charged with one count[2] of _____. However, evidence has been introduced of more than one act, any one of which may constitute _____.

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

COMMENT

Wis JI-Criminal 517 was originally published in 1985 and revised in 1992, 1993, and 2001. This revision was approved by the Committee in June 2009 and involved adding the final paragraph to the comment.

1. This instruction should be considered for use when a defendant is charged with multiple counts and evidence of more than one act is offered as proof of one or more of those counts. Wisconsin courts have been reluctant to require that an instruction on jury agreement be given in these cases. But there clearly are situations where the giving of an instruction like Wis JI-Criminal 517 will cure what may otherwise be reversible error. Two examples are State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992), and State v. Chambers, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992), discussed in detail at the end of the material following note 2, below.

2. The word "count" was used in the instruction even though it is a word with which a juror may be unfamiliar. Other approaches that did not use "count" were either awkward or inaccurate. "Count" is the word that most accurately describes the situation with which the instruction is concerned, so the Committee concluded that it should be used despite the possibility that it may be unfamiliar to a juror. If the trial judge believes that the risk of confusion is substantial, explanation of what "count" means may be appropriate.

The premise behind this instruction is that there are cases where the jury must unanimously agree on the particular act the defendant committed before he may be found guilty of a crime.

There are a number of situations where jury agreement is not required:

- "use of force" as distinguished from "threat of force," Manson v. State, 101 Wis.2d 413, 304 N.W.2d 729 (1981), Baldwin v. State, 101 Wis.2d 441, 304 N.W.2d 742 (1981);

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- liability as a principal distinguished from liability as an aider and abetter, Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979), May v. State, 97 Wis.2d 175, 293 N.W.2d 478 (1980).

- "mental purpose" as distinguished from "aware that conduct is practically certain . . ." in the definition of criminal intent. State v. Smith, 170 Wis.2d 701, 713, 490 N.W.2d 40 (1992).

- the manner in which each component of a charge under § 946.415 is satisfied [the refusal component, the physical manifestation of refusal with threat component, and the dangerous weapon component]. State v. Koeppen, 195 Wis.2d 117, 536 N.W.2d 386 (Ct. App. 1995).

- whether bodily harm was caused by the slap of a hand or a hit with a board. State v. Heitkemper, 196 Wis.2d 218, 538 N.W.2d 561 (Ct. App. 1995).

- which part of an insurance claim was false in a prosecution under § 943.395. State v. Briggs, 214 Wis.2d 281, 571 N.W.2d 881 (Ct. App. 1997).

- which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

- the specific act of the defendant that was criminally negligent in a prosecution for negligent homicide. State v. Johannes, 229 Wis.2d 215, 598 N.W.2d 299 (Ct. App. 1999).

- the act intended by a defendant charged with violating § 948.07, Child Enticement. State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833.

- the specific mental disorder that predisposes a person to sexual violence for Chapter 980 commitments. State v. Pletz, 2000 WI APP 221, 239 Wis.2d 49, 619 N.W.2d 97.

Jury agreement is required:

- whether the defendant "used, transferred, concealed, or retained possession of . . ." in prosecutions for theft by employee or bailee under 943.20(1)(b). State v. Seymour, 183 Wis.2d 683, 515 N.W.2d 874 (1994).

- when a statute provides alternative methods of committing a crime, evidence is introduced relating to two or more of those methods, and the methods are "conceptually distinct" — United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

- when evidence of two acts is admitted in support of a single charge, and the defendant has a defense to one of the acts but not to the other — State v. Giwosky, 109 Wis.2d 446, 326 N.W.2d 232 (1982) (Beilfuss, concurring).

A more difficult question is presented when a single count is charged, and evidence of two or more acts, each of which could be the basis of a separate charge, is offered in support of the single count charged. The Wisconsin Supreme Court directly confronted this issue in State v. Lomagro, 113 Wis.2d 583, 335 N.W.2d 583 (1983). In Lomagro, evidence of six separately chargeable sexual assaults was introduced in support of one charge. A 4-3 majority held it was not error to fail to instruct the jury that they must unanimously agree on the same act as constituting the charge. The justification was that the six different acts were just

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alternative ways of committing the crime and that they were not "conceptually distinct." Therefore, jury agreement is not required.

Chief Justice Beilfuss wrote the dissent which concluded that the jury should have been instructed that they must agree on one act that constituted the crime. The dissent would apply the "conceptually distinct" analysis only where a single crime could have been committed in alternative ways (e.g., armed robbery by use of force or threat of force; theft by taking and carrying away or concealing property of another). This analysis should not apply in Lomagro, says the dissent, because each of the acts was separately chargeable. If acts are separately chargeable, the "conceptually distinct" issue does not even arise. Whenever evidence of acts that could be separately charged is introduced in support of a single charge, the Lomagro dissent would require a special instruction on jury agreement.

The Lomagro holding was reevaluated in State v. Gustafson, 119 Wis.2d 676, 351 N.W.2d 653 (1984). Again by a 4-3 decision, the court declined to overrule Lomagro, holding that it was not error for the trial court to fail to give an instruction requiring that the jury agree on which of several acts constituted the single count of sexual assault at issue. The court of appeals decision in Gustafson had found error in the failure to give an instruction on jury agreement and even suggested an instruction for use in such cases (see 112 Wis.2d 369, 379, 332 N.W.2d 860 (Ct. App. 1983)). Also see State v. McMahon, 186 Wis.2d 68, 519 N.W.2d 621 (1994).

While the Wisconsin Supreme Court has made it clear in Lomagro and Gustafson that failing to give an instruction like JI-517 is not reversible error, the Committee concluded that publishing an instruction for optional use was worthwhile. Giving this kind of supplemental instruction on jury agreement when requested in cases like Lomagro and Gustafson should help to assure that the defendant's right to a unanimous jury is honored and that needless litigation is avoided. The disadvantage is that it may require jury unanimity where it is not absolutely required and thus risk prolonging or complicating jury deliberations.

The problems that use of Wis JI-Criminal 517 may avoid are illustrated by the facts in State v. Marcum, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992). The information involved multiple counts, each generally charging "having sexual contact in September 1989." Evidence was presented at trial that was inconsistent with regard to the number of occasions on which crimes were allegedly committed and with regard to the nature of the acts that took place on each occasion. Only the general unanimity instruction (Wis JI-Criminal 515) was given. The verdicts submitted were also general and failed to specify the acts that were the basis for each charge.

The court in Marcum reversed the conviction on the ground of ineffective assistance of counsel. Counsel was ineffective for failing to request a unanimity instruction and for failing to pursue more specific verdicts. The court held that "the jury must be presented with verdict forms that adequately distinguish each separately charged crime." 166 Wis.2d 908, 923. The failure to do so creates a problem of jury unanimity under the sixth amendment and a problem of due process under the fifth amendment. [See Wis JI-Criminal 484, note 2, for a discussion of addressing this problem by being more specific in the verdicts.]

The problem in Marcum could have been cured by giving an instruction like Wis JI-Criminal 517 that would have required the jury to be unanimous about the specific act that formed the basis for each count. However, the failure to give Wis JI-Criminal 517 was not directly reviewed because it was not requested. Further, since it was labelled as an "optional" instruction, the court noted that failure to give it could not be considered error. [See the discussion of Gustafson and Lomagro, supra.] The Marcum court also relied on

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the title to the former version of Wis JI-Criminal 517, which referred to "One Charge, Evidence of More Than One Act." The court interpreted this title as limiting the instruction to cases where only one charge was present. That had not been the Committee's intent; the instruction was meant to apply to any case where evidence of more than one act was admitted in support of a single charge. The 1992 revision changed the title to cure this problem.

In State v. Chambers, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992), the defendant was charged with six counts of sexual assault and testimony was admitted as to more than six acts that would constitute sexual assault. The court noted that because of the evidence of multiple acts and the fact that a party to crime situation was involved, the jury could have assigned guilt to the defendant under several different theories. The court further noted that this could have presented the problem that required reversal of the convictions in Marcum (supra) but held that the unanimity problem was solved in this case by the giving of an instruction that told the jury that they must be unanimous about the specific act that formed the basis for each count. The instruction given by the trial court in Chambers, though not cited as such, was essentially the same as Wis JI-Criminal 517. (Compare the trial court's instruction at 173 Wis.2d 237, 258, with the text of Wis JI-Criminal 517.)

In State v. Becker, 2009 WI App 59, 318 Wis.2d 97, 767 N.W.2d 585, the court of appeals rejected a challenge based on Marcum (supra). The defendant was charged with two counts of sexual assault of a child based on two acts. Neither the information nor the jury instructions tied a particular act to a particular count. The court of appeals held that the defendant waived his right to challenge jury instructions that were unclear regarding jury unanimity and waived his argument that the trial court erroneously answered the jury's question about unanimity in the way it did. However, the court also offered "the following edifying clarifications":

> ¶10 . . . . This entire issue could have been avoided if the State had not put it in play with its sloppy draftsmanship. In the complaint and information, the district attorney did not tie the specific act of Becker touching the victim's vaginal area to a specific count; nor did he tie the specific act of Becker allowing or causing the victim to touch his penis to a separate, specific count. Where a defendant, such as Becker, is charged with multiple acts violating a criminal statute, the district attorney should tie a specific act to each count in the case. The complaint and/or information should then specify in each count the specific act to which it applies. This should also be done if there are multiple acts occurring at different times or on different days. If the district attorney fails to charge with particularity, defense counsel should bring a motion to make the complaint and/or information more definite and certain. Finally, the trial court is not a lemming and should not overlook sloppy charging by the State. Rather, regardless of the State's lack of care, the trial court should take great care to not give generic, nonspecific instructions or verdict forms to the jury. Having conveyed, with particularity, how to avoid this problem in the future, we continue with our analysis.

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520 SUPPLEMENTAL INSTRUCTION ON AGREEMENT

You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.

You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.

You will please retire again to the jury room.

COMMENT

Wis JI-Criminal 520 was originally published in 1962 and revised in 1985 and 1993. This revision was approved by the Committee in October 2000 and involved adoption of a new format and updating the comment.

Subsection 805.13(5) provides the general rule relating to reinstruction of the jury and applies to criminal cases (See § 972.11(1)).

> 805.13(5) Reinstruction. After the jury retires, the court may reinstruct the jury as to all or any part of the instructions previously given, or may give supplementary instructions as it deems appropriate.

This subsection replaced former § 270.23, which allowed reinstruction to take place only once, unless the jury consented to further reinstruction. (Cf. § 270.23, 1975 Wis. Stat.)

Wis JI-Criminal 520 goes beyond simple reinstruction, of course, as it speaks to the continuation of deliberations by a jury that has expressed its inability to reach agreement. Care must be taken to assure that the instruction is given only if the jury actually is unable to reach agreement, Quarles v. State, 70 Wis.2d 87, 233 N.W.2d 401 (1975).

Wis JI-Criminal 520 (© 1962) had been approved by the Wisconsin Supreme Court on several occasions: Ziegler v. State, 65 Wis.2d 703, 223 N.W.2d 442 (1974); Madison v. State, 61 Wis.2d 333,

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212 N.W.2d 150 (1973); and Kelly v. State, 51 Wis.2d 641, 187 N.W.2d 810 (1971). Only minor changes were made in the 1985 revision.

One issue commonly raised in connection with instructions like Wis JI-Criminal 520 is the reference to "the next jury" that may be called upon to decide the same case. The objection is to the implication that another trial will be necessary. In Kelly, supra, the court held that this reference is not prejudicial error. The present version of the instruction partially addresses this objection by referring to the next jury that "may" be called upon.

Another objection raised has related to the claim of undue pressure on minority jurors. Wis JI-Criminal 520 has been distinguished from those used elsewhere on the ground that it makes no reference to minority or majority jurors but rather urges all jurors to make an honest effort to agree, see Kelly, supra. Minority jurors should not be urged to change their views, but all jurors may be asked to make a reasonable effort to reach agreement. Meade v. Richland Center, 237 Wis. 537, 297 N.W. 419 (1941).

The other major criticism of this type of instruction is that some refer to the expense and effort already expended in the trial or the duplication of that expense and effort that a deadlocked jury would require. Such references should be avoided. See Secor v. State, 118 Wis. 621, 95 N.W. 942 (1903); Hodges v. O'Brien, 113 Wis. 97, 99 N.W. 901 (102); and McDonald v. State, 193 Wis. 204, 212 N.W. 635 (1927).

The text of Wis JI-Criminal 520 is believed to be consistent with § 15-4.4 of the ABA Standards for Criminal Justice (Trial by Jury) (2d ed. 1978). This standard is emerging as a preferred response to the "deadlocked jury" problem. See, for example, State v. Weidul, 628 A.2d 135 (Maine Supreme Court, July 13, 1993). Standard 15-4.4 provides as follows:

15-4.4. Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto:

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

(v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

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521 INSTRUCTION ON JURY DELIBERATIONS

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 521 was originally published in 2008. It was withdrawn in 2011.

This instruction was withdrawn when the parts of it the Committee concluded should be preserved were incorporated into Wis JI-Criminal 515.

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522 POLLING THE JURY [SUGGESTED FORM][1]

ASK THE PRESIDING JUROR:

Has the jury reached a verdict?

IF THE ANSWER IS YES, READ THE VERDICT OR VERDICTS. AFTER EACH VERDICT, ASK THE JURY:[2]

Members of the jury, [as to this count] is this your verdict?

If it is, say yes. If it is not, say no.

IF ALL JURORS ANSWER YES,[3] ASK THE [DEFENDANT] [DEFENSE COUNSEL]:[4]

Would you like me to poll the jury?

IF THE ANSWER IS YES, ADDRESS THE JURY AS FOLLOWS:[5]

Members of the jury, I ask each one of you individually. Is this your verdict? If it is, say yes. If it is not, say no. Please begin with juror in seat number one.[6]

IF A JUROR ANSWERS NO, DO NOT INQUIRE FURTHER AND INSTRUCT THE JURY AS FOLLOWS:[7]

In a criminal case, the verdict must be reached unanimously. Please retire again to the jury room and continue with your deliberations.

IF ALL JURORS AGREE ON THE VERDICT, ASK THE [DEFENDANT] [DEFENSE COUNSEL]:

Are you satisfied with the poll?

ACCEPT THE VERDICT AND DISCHARGE THE JURORS.

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COMMENT

Wis JI-Criminal 522 was originally published in 1995 and revised in 2000. This revision was approved by the Committee in February 2007 and involved adding the material at footnote 7.

The defendant's right to poll the jury is closely related to the right to have counsel present at the time the verdict is received. The receipt of the verdict is a "critical stage" of the proceedings to which the right to counsel applies. This stage is "critical" in part because the defendant has the right to request a poll of the jury. See State v. Behnke, 155 Wis.2d 796, 801, 456 N.W.2d 610 (1990). This principle goes back to Smith v. State, 51 Wis. 615, 8 N.W. 410 (1881), which "despite its age, . . . remains the law today." State v. Wojtalewicz, 127 Wis.2d 344, 347-48, 379 N.W.2d 338 (Ct. App. 1985).

Polling the jury can be viewed as having two stages. A question to the jury as a whole, asking whether all agree on the verdict, has been referred to as "collective" polling. State v. Wojtalewicz, supra at 348-49. See note 2, below. "Individual" polling requires each juror to answer. See note 5, below.

"A defendant has the right, when timely asserted, to have the jurors individually polled on their verdict." State v. Coulthard, 171 Wis.2d 573, 581, 492 N.W.2d 329 (Ct. App. 1992). In Coulthard, the trial court reconvened the jury 50 days after the trial had concluded to conduct the individual poll. The court of appeals held this was an effective remedy.

"The right to poll the jury at the return of the verdict is a corollary to the defendant's right to a unanimous verdict. Polling is a means by which the uncoerced unanimity of the verdict can be tested. Each juror must take individual responsibility and state publicly that he or she agrees with the announced verdict." State v. Behnke, supra at 801. Also see State v. Wiese, 162 Wis.2d 507, 469 N.W.2d 908 (Ct. App. 1991); State v. Wojtalewicz, supra. A juror may dissent at any time before a verdict is received and properly recorded. State v. Cartagena, 140 Wis.2d 59, 409 N.W.2d 386 (Ct. App. 1987). Polling the jury can cure what would otherwise be error in failing to give an instruction requiring unanimity. State v. Kircher, 189 Wis.2d 392, 525 N.W.2d 788 (Ct. App. 1994).

In State v. Wiese, supra, the court held that the "American Bar Association Standards are consistent with Wisconsin law." 162 W.2d 507, 518. The decision referred to sec. 15-4.5 of the second edition of the ABA Standards (1980).

1. The procedure and statements suggested here are intended to illustrate a complete jury polling procedure. It is expected that it will be used only as a general guide, with selection of those parts that seem helpful and modification of others as appropriate to local practice and the case at hand.

2. This question to the entire jury has been referred to as "collective" polling. State v. Wojtalewicz, supra at 348-49. Each juror has the opportunity to indicate that he or she does not agree with the verdict. Where an individual polling of the jury is requested, this "collective" poll is not sufficient.

3. If the poll indicates that jurors do not unanimously agree on a verdict, they should be asked to continue deliberations. See note 7, below.

4. In State v. Jackson, 188 Wis.2d 537, 525 N.W.2d 165 (Ct. App. 1994), the court held that an indication by defense counsel that an individual poll is not requested is sufficient — obtaining an individual

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waiver from the defendant is not required. The concurring opinion recommended conducting an individual poll in every case, to "forestall a claim of ineffective assistance of counsel."

The decision whether to request an individual polling is one delegated to counsel. State v. Yang, 201 Wis.2d 721, 740, 549 N.W.2d 769 (Ct. App. 1996). Whether failure to request an individual poll constitutes deficient performance by counsel depends on all the circumstances. Id. at 741. Cited in State v. Eckert, 203 Wis.2d 497, 553 N.W.2d 539 (Ct. App. 1996). Also see State v. Brunton, 203 Wis.2d 195, 552 N.W.2d 452 (Ct. App. 1995).

Compare State v. Behnke, supra, where a conviction was reversed because the trial court failed to poll the jury in a case where counsel was absent at the time the verdict was returned. The court held that in those circumstances, it was error to fail to obtain the defendant's "knowing, voluntary, and unequivocal waiver" of both the right to poll the jury and the right to counsel.

5. This question pursues the "individual" polling of the jurors. "The practice requires each juror to answer for himself. . . . The 'confrontational' element is important. A defendant in a criminal case has the right to require each member of the jury when face to face with the accused to state whether or not the verdict is his verdict." State v. Wojtalewicz, supra at 349 (citations omitted).

6. The Committee recommends identifying the jurors by their seat number. It is also common practice to identify the jurors by name. See, for example, State v. Wiese, supra.

7. When a juror responds with an unambiguous "no," the trial court has two options: grant a mistrial or return the jury for further deliberations. The court should not continue to question the individual juror. State v. Raye, 2005 WI 68, 281 Wis.2d 339, 697 N.W.2d 407, ¶38.

"If there is a dissent, or if it is stated by the juror that the assent is merely an accommodation and against the juror's conscience, it is the duty of the court, upon its own motion, to direct the jury to retire and reconsider its verdict." State v. Wiese, supra at 518.

If the court decides to send the jury back for further deliberation, the Committee recommends a simple statement directing them to do so, as provided in the instruction. If additional instruction is believed to be necessary, see Wis JI-Criminal 520, Supplemental Instruction On Agreement.

While a clear statement that a juror does not agree on the verdict requires that the jury be asked to resume deliberations, the court should be alert for less unequivocal indications of lack of agreement. "[T]he court should interrogate a juror who, during the poll, creates some doubt as to his vote. . . . Doubt may result from the juror's demeanor or tone of voice as well as the language he uses. Prior to further questioning, however, the court should make a determination that the juror's answer was ambiguous or ambivalent." State v. Cartagena, 140 Wis.2d 59, 62, 409 N.W.2d 386 (Ct. App. 1987). However, there is no right to "cross-examine the jurors on their verdict." Ibid., citing State v. Ritchie, 46 Wis.2d 47, 56, 174 N.W.2d 504 (1970).

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525 INSTRUCTION AFTER VERDICT RECEIVED

Your service in this case is completed.

You do not have to answer questions about the case from anyone other than the court. There is no requirement that you maintain secrecy concerning what happened in the jury room, but you do not have to discuss the case with anyone or answer any questions about it.

COMMENT

Wis JI-Criminal 525 was originally published in 1984 and revised in 1994. This revision was approved by the Committee in December 2000 and involved adoption of a new format.

This instruction, adapted from Wis JI-Civil 197, is considered optional. It may be appropriate in those cases where the jurors might find it helpful to be advised by the court that it is solely their decision whether or not to talk to others about their jury service.

The present Rules of Professional Conduct do not explicitly address posttrial contact between lawyer and jurors. The only applicable rule is SCR 20:3.5, which provides as follows:

> **SCR 20:3.5 Impartiality and decorum of the tribunal**
> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person except as permitted by law or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule a matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication; or
> (c) engage in conduct intended to disrupt a tribunal.

Former Supreme Court Rule 20.42 imposed the following restrictions on lawyers' communications with jurors:

> (4) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer may not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.
>
> (5) A lawyer may not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

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(6) All restrictions imposed by this section upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

The ABA Standards for Criminal Justice (3rd ed.) also address the issue of posttrial contact with jurors.

Standard 3-5.4, The Prosecution Function, treats the prosecutor's responsibilities as follows:

(c) After discharge of the jury from further consideration of a case, a prosecutor should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service. If the prosecutor believes that the verdict may be subject to legal challenge, he or she may properly, if no statute or rule prohibits such course, communicate with jurors to determine whether such challenge may be available.

Standard 4-7.3, The Defense Function, provides the same standard for defense counsel.

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525A INSTRUCTION AFTER VERDICT RECEIVED — ALTERNATIVE FORM

[THIS INSTRUCTION IS SUGGESTED FOR USE IN CASES WHERE THE COMMITMENT, INCONVENIENCE, ETC., REQUIRED OF JURORS WAS WELL BEYOND THAT OF A TYPICAL CASE.]

Now that your service in this case is completed, some of you may have questions about the confidentiality of the proceedings. You are free to discuss the case with any person you choose. However, you do not have to discuss the case with anyone or answer any questions about it from anyone other than the court.

If you do decide to discuss the case with anyone, including the media, keep in mind that your fellow jurors fully and freely stated their opinions and may not want their opinions made public. Please respect the privacy of the views of your fellow jurors.

If any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room.

Members of the jury, on behalf of _____ County the court would like to express its sincerest gratitude and appreciation for your service in this case. The court recognizes that you have devoted significant time and tolerated restrictions on your normal activities during this trial. Your service is a necessary and essential part of the justice system guaranteed by the Constitution of the United States. I hope you found the experience a rewarding one.

COMMENT

Wis JI-Criminal 525A was approved by the Committee February 2010.

This instruction is a longer version of Wis JI Criminal 525 and is recommended for consideration for the extraordinary or "notorious" case. "Extraordinary" is used in the sense of requiring commitment,

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inconvenience, etc., well beyond that which attends jury service in a typical case. "Notorious" is used in the sense of "generally known and talked of."

This instruction is based on one recommended at pp. 94-95 in Managing Notorious Trials, National Center For State Courts, 1998.

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550 SOLICITATION AS A CRIME — § 939.30

Statutory Definition of the Crime

The crime of solicitation, as defined in § 939.30 of the Criminal Code of Wisconsin, is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent.

The defendant in this case is charged with advising that the crime of (name of felony) be committed. (Name of felony) is a felony.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended that the crime of (name of felony) be committed.

   The crime of (name of felony) is committed by one who

   > [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE][1]

2. The defendant advised another person, by the use of words or other expressions, to commit the crime of (name of felony) and did so under circumstances that indicate, unequivocally, that the defendant intended that (name of felony) be committed.

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"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts.[2]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 550 was originally published in 1962 and revised in 1994 and 2000. The 2000 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The Comment was revised in April 2019.

This instruction is for the inchoate crime of solicitation, as defined in § 939.30. Liability as a party to crime under § 939.05, based on "soliciting" another to commit a crime, is addressed by Wis JI Criminal 415.

Solicitation under § 939.30 is a Class D felony, with two exceptions: solicitation to commit a crime punishable by life imprisonment is a Class C felony; solicitation to commit a Class E felony is punished as a Class E felony. See § 939.30(2).

In State v. Yee, 160 Wis.2d 15, 465 N.W.2d 260 (Ct. App., 1990), Yee asked Dino Corti to find someone who would break the arms and legs of Mr. Li and later kill him. Corti informed the police and Yee was arrested. The court of appeals reversed the trial court's dismissal of solicitation charges, holding: "if A, with intent that a felony be committed, advises B to procure C to commit the felony under circumstances which indicate unequivocally that A has such intent, A is guilty of the crime of solicitation, contrary to sec. 939.30. . . ." 160 Wis.2d 15, 16.

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In State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992), Manthey, a potential witness in a malpractice action, indicated to the plaintiff's husband that she would testify favorably only if paid by the plaintiff. The court of appeals applied the Yee rationale to this case, which did not involve a "C": ". . . Manthey advised Otis to engage in the commission of the crime of perjury when she offered to commit perjury if he paid her. The Yee rationale, therefore, does not require the existence of 'C'." The court referred to this type of case as one involving a "double inchoate crime." 169 Wis.2d 673, 687.

In State v. Boehm, 127 Wis.2d 351, 379 N.W.2d 874 (Ct. App. 1985), Boehm solicited Larry Poor to murder Ron Hitchler. Before anything was done, she told Poor that she was "done with" the killing and called the whole thing off. The court of appeals held that a defense of renunciation or withdrawal does not apply to the crime of solicitation under § 939.30:

> Renunciation or withdrawal cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed. Renunciation or withdrawal therefore cannot be a defense to the completed crime of solicitation, in the absence of statute.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, Kloss solicited his wife to shoot a gun through the front door if any police officers returned to their house. The State charged Kloss with one count of solicitation of first-degree reckless injury, Wis. Stat. § 940.23(1)(a). Kloss was convicted and appealed, arguing in part that it is not possible for a person to intend that another person succeed in causing great bodily harm by reckless conduct because whether harm will result from the other person's reckless conduct is entirely unpredictable. The court of appeals held that a solicitor can intend at the time of the solicitation, that great bodily harm result from the solicitee's reckless conduct. While the uncertainty of whether an injury will in fact result from the solicitee's conduct at the time of the solicitation is "inescapable in an inchoate crime such as solicitation," no level of certainty is required to form a purpose to cause a particular result. Kloss, 386 Wis.2d 314, 322 (2019). [**Reporter's Note:** The Wisconsin Supreme Court granted review in Kloss on June 17, 2019.]

1. If the instruction on the intended crime involves considerable elaboration, it may aid jury understanding to move this description to the end of the instruction, immediately preceding the "Jury's Decision" paragraphs.

2. This is the definition of "unequivocally" used in Wis JI-Criminal 580, Attempt.

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570 CONSPIRACY AS A CRIME — § 939.31

Statutory Definition of the Crime

The crime of conspiracy, as defined in § 939.31 of the Criminal Code of Wisconsin, is committed by one who, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime, if one or more of the parties to the conspiracy does an act to effect its object.

The defendant in this case is charged with having conspired to commit the crime of (name of crime).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended that the crime of (name of crime) be committed.

   The crime of (name of crime) is committed by one who

   [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.][1]

2. The defendant was a member of a conspiracy to commit the crime of (name of crime).

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A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE:

[As long as the parties agreed or combined by their words or actions, and the defendant intended that the agreement be carried out, it is not necessary that the other person intended to carry out the agreement.][2]

3. One or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement.

However, the act need not, by itself, be an unlawful act or an attempt to commit the crime. If there was an act which was a step toward accomplishing the criminal objective, that is sufficient.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 570 was originally published in 1962 and revised in 1994, 1998, and 2001. This revision was approved by the Committee in October 2007 and involved a minor correction in the text and additions to the Comment.

This instruction is for the inchoate crime of conspiracy, as defined in § 939.31. Liability as a party to crime under § 939.05, based on conspiring to commit a crime, is addressed by Wis JI-Criminal 410 - 412.

Conspiracy under § 939.31 carries the same penalty as that for the completed crime, except that conspiracy to commit a crime punishable by life imprisonment is a Class B felony.

In a case dealing with a charge of conspiracy to deliver a controlled substance under § 961.41(1x), the Wisconsin Supreme Court held that a conspiracy is not established by proof only of an agreement between a buyer and a seller for a delivery of a small amount of controlled substance for personal use by the buyer. State v. Smith, 189 Wis.2d 496, 498, 525 N.W.2d 264 (1995). In Smith, there was no claim that the buyer intended to deliver the cocaine to third party. The court concluded that "the legislature did not intend a buyer-seller relationship for a small amount of cocaine for the buyer's personal use to be a conspiracy. . . ." 189 Wis.2d 496, 501. For a case where there was sufficient evidence of an agreement to furnish drugs to a third party, see State v. Cavallari, 214 Wis.2d 42, 571 N.W.2d 176 (Ct. App. 1997). Also see State v. Ray, 166 Wis.2d 855, 481 N.W.2d 855 (Ct. App. 1992), and State v. Blalock, 150 Wis.2d 688, 442 N.W.2d 514 (Ct. App. 1989).

In another case involving a charge of conspiracy under § 961.41(1x) [which incorporates § 939.31 by reference], the court found the evidence sufficient to support a finding of conspiracy to manufacture psilocybin/psilocin based on the sale of a single "grow kit." State v. Routon, 2007 WI App 178, 304 Wis.2d 480, 736 N.W.2d 530. Routon also discussed the Wisconsin rule that a "stake in the venture" is not a necessary element of a conspiracy. See Wis JI-Criminal 410, footnote 3, which discusses the leading cases referred to in Routon: United States v. Falcone, 109 F.2d 579 (CCA 2d, 1940); and, Direct Sales Co. v. United States, 319 U.S. 703 (1943).

For a decision ordering withdrawal of a guilty plea because a factual basis for conspiracy was lacking, see State v. West, 214 Wis.2d 467, 571 N.W.2d 196 (Ct. App. 1997).

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Venue in a conspiracy case is established under § 971.19(2) in any county where an act to effect the object of the conspiracy took place. State v. Cavallari, supra at 55.

Withdrawal Is Not A Defense

Though there is not direct authority on point, the Committee has concluded that withdrawal or renunciation is not a defense to the inchoate crime of conspiracy as defined in § 939.31. In closely related situations, Wisconsin appellate courts have held that extending a defense of withdrawal to inchoate crimes requires specific statutory authority. State v. Boehm, 127 Wis.2d 351, 354, 379 N.W.2d 874 (Ct. App. 1985) addressed solicitation under § 939.30: "Renunciation or withdrawal cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed. Renunciation or withdrawal therefore cannot be a defense to the completed crime of solicitation, in the absence of a statute."

State v. Stewart, 143 Wis.2d 28, 45-46, 420 N.W.2d 44 (1988) addressed attempt under § 939.32: "We conclude that if the legislature had intended voluntary abandonment to be a defense, it would have expressly said so. We do not believe this court should distort the statutory language to incorporate the defense. The public policy arguments in favor of the defense are better addressed to the legislature than to the court."

Drafts of the Wisconsin criminal code revisions of 1950 and 1953 contained a separate provision that would have reduced the penalty for conspiracy, solicitation, and attempt for defendants who voluntarily changed their minds and took steps which prevented the completion of the crime. Those provisions were not part of the revised criminal code adopted in 1956. See § 339.20, 1950 Report of the Wisconsin Legislative Council; § 339.33, 1953 Report of the Wisconsin Legislative Council.

Section 939.05, which addresses liability as a party to a crime, does have a provision relating to withdrawal from conspiracy or solicitation. Section 939.05(2)(c) provides that withdrawal can excuse a defendant from liability for completed crimes committed by other parties after the withdrawal. Section 939.05 was part of the criminal code revision enacted in 1956. Comments to the drafts stated that "a co-conspirator or solicitor who withdraws is responsible only for the crimes of conspiracy or solicitation." See, § 339.33, 1953 Report of the Wisconsin Legislative Council.

Professor LaFave addresses the issue as follows:

> The traditional rule here "is strict and inflexible: since the crime is complete with the agreement, no subsequent action can exonerate the conspirator of that crime." [Citing Model Penal Code § 5.03, Comment at 457 (1985).] In those jurisdictions which have added by statute an overt act requirement, the defendant is not punishable as a member of the conspiracy only if he withdraws before the overt act has been committed, but this is not significantly different from the common law rule.

LaFave, Substantive Criminal Law 2nd Ed., §12.4(b) (West 2003).

The Committee concluded that the rule articulated above applies in Wisconsin. Once the inchoate crime of conspiracy is completed — which in Wisconsin requires an agreement and an "act toward the commission of the intended crime" — withdrawal is not a defense. Evidence relating to withdrawal, however, may be relevant to the elements of the inchoate crime: whether the defendant was a member of the conspiracy when

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the "act toward the commission of the intended crime" was committed; and, whether the defendant intended that the crime be committed.

1. If the instruction on the intended crime involves considerable elaboration, it may aid jury understanding to move this description to the end of the instruction, immediately preceding the "Jury's Decision" paragraphs.

2. This is intended for the type of case considered in State v. Sample, 215 Wis.2d 487, 573 N.W.2d 187 (1998), where the conspiracy involved a feigned agreement by an undercover police officer, who furnished drugs that the defendant planned to deliver to a jail inmate. The Sample decision held that hte "unilateral" approach to conspiracy applies under § 939.31 of the Wisconsin Statutes. Under that approach, "criminal conspiracy will lie even where one of the alleged 'co-conspirators' is, unknown to the defendant, an undercover police agent or a police informant who merely feigns participation in the conspiracy." Sample, 215 Wis.2d 486, 495-96. Put another way, § 939.31 adopts a subjective approach focusing on the criminal intent of the defendant.

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580 ATTEMPT — § 939.32

The defendant is charged with attempted (name intended crime).

Statutory Definition of the Crime

The crime of attempted (name intended crime), as defined in § 939.32 and § ____[1] of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name intended crime), does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[2] were present.

Elements of the Crime That the State Must Prove

1. The first element of attempted (name intended crime) requires that the defendant intended[3] to commit the crime of (name intended crime).

The crime of (name intended crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

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The crime charged against the defendant in this case, however, is not (name intended crime) as defined but an attempt to commit the crime of (name intended crime).

2. The second element of attempted (name intended crime) requires that the defendant did acts toward the commission of the crime of (name intended crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name intended crime) except for the intervention of another person or some other extraneous factor.[5]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of attempted (name intended crime) have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 580 was originally published in 1967 and revised in 1979, 1988, 1995, 2001, and 2002. The 2002 revision involved nonsubstantive changes to the text and revision of the directions in the text at footnote 4. This revision was approved by the Committee in December 2012; it updated the Comment.

Subsection (1) of § 939.32 states the general rule that attempt liability applies only to felonies, plus four specified misdemeanors: § 940.19 Battery; § 940.195 Battery to an unborn child; § 943.20 Theft; and, § 943.74 Theft of farm-raised fish. These subsections enumerate all the offenses which may be prosecuted as 'attempts'." State v. Cvorovic, 158 Wis.2d 630, 634, 462 N.W.2d 897 (Ct. App. 1990). Thus, "attempted fourth degree sexual assault" is not a prosecutable offense. Ibid.

Several offenses are defined to include attempts as violations of the statute involved. These are included in the list found at subsections (1)(c) through (g) of § 939.32. Uniform instructions for these offenses suggest building in the substance of Wis JI-Criminal 580 in summary form. See, for example, Wis JI-Criminal 1290-1296, Intimidation of Victims and Witnesses under §§ 940.42-.46; Wis JI-Criminal 2134, Child Enticement under § 948.07; and Wis JI-Criminal 6030, Possession of a Controlled Substance under § 961.41.

The general rule is that the maximum fine and maximum term of imprisonment for an attempt is half that for the completed crime. § 939.32(1g)(a) and (b)1. The maximum penalty for attempts to commit Class A felonies is that for a Class B felony. Subsections (1g)(b)2. specifies how penalty enhancement provisions affect the penalties. Subsection (1m) specifies how bifurcated sentences are to be structured for attempts.

An issue that has received extensive attention in connection with attempt is commonly discussed in terms of "impossibility": Is a person guilty of an attempt if it was "impossible" for the crime to be committed under the circumstances? This issue was addressed in State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1993), where the defendant was charged with an attempt to receive stolen property based on his buying a motorcycle from an undercover police officer. The police had made representations to Kordas that the cycle was stolen when, in fact, it had been provided to the Milwaukee Police Department for educational purposes. The trial court dismissed the charge, holding that it was "legally impossible" to attempt to receive stolen property where, in fact, the property is not stolen. The court of appeals reversed:

> . . . Kordas did in fact possess the necessary criminal intent to commit the crime of receiving stolen property. The extraneous factor — that the motorcycle was not stolen — was unknown to him and had no impact on his intent. Thus the legal impossibility not apparent to Kordas should not absolve him from the offense of attempt to commit the crime he intended. 191 Wis.2d 124, 130 (citations omitted).

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On the crime of attempt generally, see State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Oakley v. State, 22 Wis.2d 298, 125 N.W.2d 657 (1964). Also see: State v. Henthorn, 218 Wis.2d 526, 581 N.W.2d 544 (Ct. App. 1998), finding the evidence insufficient to support a charge of attempt to obtain a controlled substance by fraud; and State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App. 1998), holding that the crime of attempted felony murder does not exist.

1. For example, if the crime charged is attempted burglary, the first part of this sentence would read: "The crime of attempted burglary, as defined in § 939.32 and § 943.10 of the Criminal Code of Wisconsin . . ."

2. The instruction identifies two elements for this offense: (1) intent to commit the crime; and (2) acts which demonstrate unequivocally that the defendant intended to commit and would have committed the crime except for the intervention of another person or some other extraneous factor.

In Berry v. State, 90 Wis.2d 316, 280 N.W.2d 204 (1979), the Wisconsin Supreme Court agreed with this analysis by reversing a decision of the Wisconsin Court of Appeals (see Berry v. State, 87 Wis.2d 85, 273 N.W.2d 376 (Ct. App. 1978)), which had concluded that proof of failure to complete the crime was an essential element of attempt. The supreme court held that "[f]ailure, if and by whatever means the actor's efforts are frustrated, is relevant only insofar as it may negate any inference that the actor did in fact possess the necessary criminal intent to commit the crime in question." 90 Wis.2d 316, 327. This conclusion is consistent with this instruction.

3. See State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts after the 1989 revision of the statute defining "intent." (See § 939.23, discussed in Wis JI-Criminal 923A and 923B.)

4. List the elements set forth in the uniform instruction for the intended crime. Elements beginning with "the defendant" should be modified by deleting those words. Other minor modifications may also be required. The defendant charged with an attempt will not have completed the crime and therefore will not have committed each of the elements. However, the defendant must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime. The Committee recommends including definitions from the uniform instructions when requested or when the evidence has focused on an issue addressed by a definition. Note that some definitions include requirements that are of equal importance to elements of crimes. See, for example, the definitions of "sexual contact" provided in Wis JI-Criminal 1200A and 2101A.

See Wis JI-Criminal 581 EXAMPLE and 582 EXAMPLE for illustrations of how the elements of burglary and armed robbery would be integrated with the general pattern instruction for attempt cases involving attempted burglary and attempted armed robbery. Wis JI-Criminal 1070 provides a model for attempted first degree intentional homicide.

5. The presence of an "extraneous factor" is not a fact which must be separately proved by the state. Rather, it helps define the intent which the defendant must have. See State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), discussed in note 8, below.

"Extraneous factor" is retained in the instruction for several reasons: it is part of the statutory definition; it does help the jury understand the intent required; and, as a practical matter, most attempt cases do involve an "extraneous factor" that has interrupted the defendant's activities.

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The "extraneous factor" issue is discussed in State v. Damms, supra, and Adams v. State, 57 Wis.2d 515, 204 N.W.2d 657 (1973).

6. The "unequivocal act" requirement is discussed in State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970).

7. See note 5, supra.

8. The version of Wis JI Criminal 580 in effect from 1967 to the time of the 1988 revision included a footnote on "voluntary desistance" at this point in the text. The note suggested that:

> [w]here there is evidence that the defendant voluntarily desisted, or there is evidence that because of facts that were known to the defendant, it was impossible for him to commit the crime, insert the following paragraph in the instruction:
>
> If the defendant did not commit the crime of _____ (because he voluntarily desisted) or (because of facts, known to the defendant, which made it impossible for him to commit the crime), he is not guilty of attempted _____.

Wis JI-Criminal 580 © 1980.

This reference was deleted in 1988 because of the decision of the Wisconsin Supreme Court in State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988). In Stewart, the defendant and Moore confronted a person in a semi-enclosed bus stop shelter. They demanded that the person "give us some change" three or four times in an increasingly loud voice. At one point, Stewart reached into his coat, whereupon Moore told him to "put that gun away." Then a third associate, Levy, stepped into the bus shelter and said to Stewart and Moore: "Come on, let's go." The three men left, though Moore later returned and made small talk with the person from whom money had been requested.

The Wisconsin Supreme Court affirmed Stewart's conviction for attempted robbery. The court did not decide the case on the more narrow grounds of sufficiency of the evidence or whether the victim's resistance and Levy's intervention constituted an "extraneous factor." Rather, the court stated a broader rationale, interpreting § 939.32(3) as follows:

> [T]o prove attempt, the state must prove an intent to commit a specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable the accused would desist of his or her own free will. The intervention of another person or some other extraneous factor that prevents the accused from completing the crime is not an element of the crime of attempt. If the individual, acting with the requisite intent, commits sufficient acts to constitute an attempt, voluntary abandonment of the crime after that point is not a defense.

143 Wis.2d, 28, 31.

The court dealt with three issues raised by the defendant. First, the court found the evidence was sufficient to support "the first element of attempted robbery — intent to commit robbery." 143 Wis.2d 28, 37. Second, the court found that Stewart "went far enough" in pursuance of this intent to constitute an attempt. The court rejected Stewart's contention that:

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> . . . sufficient acts are not committed until the intervention of another person or extraneous factor prevents completion of the crime. If there is no such intervention, the defendant argues, the acts taken toward the criminal end are too few to constitute an attempt. In effect the defendant argues that § 939.32(3) requires the state to prove that "the intervention of another person or some other extraneous factor" impeded the defendant's completion of the crime.

143 Wis.2d 28, 38.

Rather, the court concluded that the statute does not require that the defendant's conduct be interrupted by another person or some other extraneous factor:

> When the accused's acts demonstrate unequivocally that the accused will continue unless interrupted, that is, when the acts demonstrate that the accused will probably not desist from the criminal course, then the accused's dangerousness is manifest. Accordingly we reject defendant's assertion that § 939.32(3) requires the state to prove the intervention of another person or an extraneous factor.
>
> The purpose of the language in § 939.32(3) relating to intervention of another person and extraneous factor is to denote that the actor must have gone far enough toward completion of the crime to make it improbable that he would change his mind and desist. The conduct element of § 939.32(3) is satisfied when the accused engages in conduct which demonstrates that only a circumstance beyond the accused's control would prevent the crime, whether or not such a circumstance actually occurs. An attempt occurs when the accused's acts move beyond the incubation period for the crime, that is, the time during which the accused has formed an intent to commit the crime but has not committed enough acts and may still change his mind and desist. In other words the statute requires a judgment in each case that the accused has committed sufficient acts that it is unlikely that he would have voluntarily desisted from commission of the crime.

143 Wis.2d 28, 41-42.

The third issue considered was Stewart's claim that the "voluntary abandonment of criminal conduct after the attempt was complete but before the crime of robbery was consummated excuses him from criminal liability." 143 Wis.2d 28, 44. The court held that § 939.32(3) does not expressly recognize voluntary abandonment as a defense and further held that State v. Hamiel, 92 Wis.2d 656, 285 N.W.2d 639 (1979), did not embrace such a defense either. In the absence of express legislative recognition of the voluntary abandonment (or "voluntary desistance") defense, the court held it was not proper for the court to create it.

Therefore, after Stewart, it is clear that once the defendant "has gone far enough" to constitute an attempt, a decision to end the conduct will not relieve the person of criminal liability for an attempt to commit a crime. Deciding when the attempt has really occurred will continue to be a potentially difficult factual question after Stewart, which the jury will have to resolve by reference to the legal standard provided by § 939.32: Do the defendant's acts demonstrate unequivocally that he intended to commit a crime?

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581 EXAMPLE ATTEMPTED BURGLARY — § 939.32 and 943.10

The defendant is charged with attempted burglary.

Statutory Definition of the Crime

The crime of attempted burglary, as defined in § 939.32 and § 943.10 of the Criminal Code of Wisconsin, is committed by one who, with intent to commit burglary, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[1] were present.

Elements of the Crime That the State Must Prove

1. The first element of attempted burglary requires that the defendant intended[2] to commit the crime of burglary.

   The crime of burglary is committed by one who[3]

   - intentionally enters a building; and
   - enters a building without the consent of the person in lawful possession; and
   - knows that the entry was without consent; and
   - enters the building with intent to steal.

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"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and the intent to deprive the owner permanently of possession of the property.

ADD OTHER DEFINITIONS FROM WIS JI-CRIMINAL 1421 AS NECESSARY[4]

The crime charged against the defendant in this case, however, is not burglary as defined, but an attempt to commit the crime of burglary.

2. The second element of attempted burglary requires that the defendant did acts toward the commission of the crime of burglary which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of burglary except for the intervention of another person or some other extraneous factor.[5]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of attempted burglary have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 581 EXAMPLE was approved by the Committee in March 2002.

This instruction uses burglary as an example to illustrate how the elements of the crime attempted would be integrated with the general pattern instruction for attempts. The elements of the crime of burglary are listed under the first element of attempt. Definition of one key term, "intent to steal," is included.

1. See note 2, Wis JI-Criminal 580.

2. See note 3, Wis JI-Criminal 580.

3. These are the elements set forth in Wis JI-Criminal 1421, Burglary With Intent To Steal. In that instruction, each element begins with "the defendant." Those words were removed when the elements were integrated into the general attempt model because the defendant charged with attempt will not have completed the crime and therefore will not have directly committed each of the elements. However, the defendant charged with attempt must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime.

4. Two definitional paragraphs of Wis JI-Criminal 1421 are not included in this example: one dealing with "when must intent exist" and one dealing with "deciding about intent and knowledge." Upon request, or when the evidence has focused on either or both of those issues, the Committee recommends that those paragraphs be included in the attempt instruction.

5. See note 5, Wis JI-Criminal 580.

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6. See note 6, Wis JI-Criminal 580.

7. See note 5, Wis JI-Criminal 580.

8. See note 8, Wis JI-Criminal 580.

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582 EXAMPLE ATTEMPTED ARMED ROBBERY — § 939.32 and 943.32(2)

The defendant is charged with attempted armed robbery.

Statutory Definition of the Crime

The crime of attempted armed robbery, as defined in § 939.32 and § 943.32 of the Criminal Code of Wisconsin, is committed by one who, with intent to commit armed robbery, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[1] were present.

Elements of the Crime That the State Must Prove

1. The first element of attempted armed robbery requires that the defendant intended[2] to commit the crime armed robbery.

   The crime of armed robbery is committed by one who[3]

   - takes and carries away property from the person or from the presence of the owner of the property; and
   - takes the property with the intent to steal; and
   - acts forcibly; and
   - uses or threatens to use a dangerous weapon.

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"Intent to steal" requires the mental purpose to take and carry away movable property of another without consent and the intent to deprive the owner permanently of possession of the property.

ADD OTHER DEFINITIONS FROM WIS JI-CRIMINAL 1480 AS NECESSARY.[4]

The crime charged against the defendant in this case, however, is not armed robbery as defined, but an attempt to commit the crime of armed robbery.

2. The second element of attempted armed robbery requires that the defendant did acts toward the commission of the crime of armed robbery which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of armed robbery except for the intervention of another person or some other extraneous factor.[5]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of attempted armed robbery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 582 EXAMPLE was approved by the Committee in March 2002.

This instruction uses armed robbery as an example to illustrate how the elements of the crime attempted would be integrated with the general pattern instruction for attempts. The elements of the crime of armed robbery are listed under the first element of attempt. Definition of one key term, "intent to steal," is included.

1. See note 2, Wis JI-Criminal 580.

2. See note 3, Wis JI-Criminal 580.

3. These are the elements set forth in Wis JI-Criminal 1480, Armed Robbery, with one change identified below. In that instruction, four elements begin with "the defendant." Those words were removed when the elements were integrated into the general attempt model because the defendant charged with attempt will not have completed the crime and therefore will not have directly committed each of the elements. However, the defendant charged with attempt must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime.

The first element of armed robbery is stated in Wis JI-Criminal 1480 as: "(Name) was the owner of property." An element stated that way is not easily accommodated in the format used by JI 580, which states: "The crime of _____ is committed by one who . . ." This instruction addresses that by combining the first two elements of armed robbery into one element.

4. Several definitions provided in Wis JI-Criminal 1480 are not included in this example: dealing with "owner," "forcibly," "imminent," and "dangerous weapon." Upon request, or when the evidence has

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focused on any of those issues, the Committee recommends that the definitions be included in the attempt instruction.

5. See note 5, Wis JI-Criminal 580.

6. See note 6, Wis JI-Criminal 580.

7. See note 5, Wis JI-Criminal 580.

8. See note 8, Wis JI-Criminal 580.

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600 INTRODUCTORY COMMENT: NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT: INSTRUCTIONS FOR THE "BIFURCATED" TRIAL AND REEXAMINATION

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Scope

Wis JI-Criminal 601-662 provide a series of recommended instructions for use in the "bifurcated" trial which is held when a criminal defendant enters pleas of not guilty and not guilty by reason of mental disease or defect. Section 971.165 requires that the issues of guilt and responsibility be heard separately, "with a sequential order of proof in a continuous trial."

This Introductory Comment outlines the phases of the trial and reexamination by identifying the issue to be determined and the burden of proof at each phase and by briefly summarizing the suggested instructions. There is a "preliminary" and a "final" instruction for each stage. The "preliminary" instruction is to be read to the jury before evidence is received. The "final" instruction is to be used after the evidence has been received, along with any other general instructions that may be appropriate. This Comment also outlines the court's authority and responsibility with respect to commitment, conditional release, and termination of the commitment.

I. First Phase

A. Issue To Be Determined

The issue at the first phase is "guilt": Did the defendant commit all the required elements of the offense charged? Expert opinion testimony on the defendant's capacity to form a mental element required as an element of the crime (e.g., intent to kill) is not admissible at the first phase of the trial. Steele v. State, 97 Wis.2d 72, 97-98, 294 N.W.2d 2 (1980). Caution should be exercised in trying to apply a flat rule of exclusion to evidence that is offered by a criminal defendant. Cases decided after Steele have made it clear that the rule excluding expert testimony on intent is limited to expert opinion testimony on the capacity to form intent based on mental health history. See State v. Flattum, 122 Wis.2d 282, 361 N.W.2d 705 (1985), and State v. Repp, 122 Wis.2d 246, 362 N.W.2d 415 (1985). For a helpful description of what the current rule is and how it developed, see Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990).

A defendant may join a plea of guilty with a plea of not guilty by reason of mental disease or defect, see § 971.06(1)(d). The first phase is not necessary in these cases, but the usual guilty plea acceptance procedures must be followed to establish that the plea is voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986). It is not error to allow a defendant to combine a no contest plea with a plea of not guilty by reason of mental disease or defect. State v. VanderLinden, 141 Wis.2d 155, 414 N.W.2d 72 (Ct. App. 1987).

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B. Burden Of Proof

The burden of proof at the first phase is on the State to prove all elements of the offense beyond a reasonable doubt. The first phase of the "bifurcated" trial is essentially the same as a regular criminal trial held where no special plea is entered.

C. Jury Instructions

1. JI-Criminal 601

JI-601 is the preliminary instruction to be read to the jury before the beginning of the trial where the defendant has entered pleas of not guilty and not guilty by reason of mental disease or defect. It tells the jury that there will be two phases to the trial: the first dealing with "guilt"; the second dealing with "responsibility."

2. JI-Criminal 602

JI-602 provides a paragraph that is to be added to the general instructions which follow the first phase of the trial. It emphasizes that a second phase of the trial will follow a finding that the defendant is guilty. It should be followed by the standard instruction for the offense charged.

II. Second Phase

A. Issue To Be Determined

The issue at the second phase of the trial is whether the defendant is to be relieved of responsibility for his criminal act because he suffered from mental disease or defect at the time of the offense. The standard is identified in § 971.15(1) as follows:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.

The instructions split this standard into two questions, one asking if the mental disease or defect was present and the other asking if it had the required effect on the defendant.

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A defendant's proffered jury waiver at the second phase is subject to the usual requirement that the jury may only be waived with the consent of the state, per § 972.02(1). State v. Murdock, 2000 WI App 170, 238 Wis.2d 301, 617 N.W.2d 175.

B. Burden Of Proof

The burden of proof is established by § 971.15(3): The defendant must establish the presence of the mental disease or defect "defense" "to a reasonable certainty by the greater weight of the credible evidence."

1987 Wisconsin Act 86 (effective date: November 28, 1987) created § 971.165(2) which provides that a five-sixths verdict applies at the second phase. State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), held that a five-sixths verdict applied even before the statute was changed.

C. Jury Instructions

1. JI-Criminal 603

JI-603 is the preliminary instruction to be read to the jury before the second phase of the trial begins. It can be used if the first phase was tried to a jury, or if the first phase was tried to the court, or if the defendant entered a guilty plea and joined it with a plea of not guilty by reason of mental disease or defect. If a guilty plea is entered at the guilt phase, the usual plea acceptance procedures must be followed to assure that the plea was voluntarily entered and to establish that there is a factual basis for it. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

JI-603 explains that the second phase will be concerned with whether the defendant is "responsible" or "not responsible" for his criminal conduct. The Committee determined that phrasing the issue in terms of "responsibility" was preferable to the statutory terms "guilty but not guilty by reason of . . . ." The instruction emphasizes that the second phase is concerned with the defendant's mental condition at the time of the offense and informs the jury that if the defendant is found to be "not responsible," he or she will be committed to the custody of the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

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2. JI-Criminal 605

JI-605 is the final instruction for the second phase of the trial. It is drafted for use where the plea is based on the presence of a mental disease or mental defect. Former Wis JI-Criminal 605A (c. 1995) which provided a separate instruction for cases involving "mental defect" was withdrawn in 2003 and combined with this instruction. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive — mental disease and defect — since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense. And to use "and/or" would not have been desirable.

JI-605 divides the responsibility issue into two questions. The first question asks if the defendant had a "mental disease or defect" at the time the offense was committed. "Mental disease or defect" is broadly defined but is limited by the second question which asks if the mental disease or defect had the required effect on the defendant: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law?

In State v. Leach, 124 Wis.2d 648, 370 N.W.2d 240 (1985), reversing (as to this issue) 122 Wis.2d 339, 363 N.W.2d 234 (Ct. App. 1984), the Wisconsin Supreme Court held that the defendant may be held to a burden of producing sufficient evidence on the responsibility issue before it need be submitted to the jury:

> The constitution does not require that a defendant be allowed to present the affirmative defense of not guilty by reason of mental disease or defect to the jury when he has failed to produce sufficient evidence to raise a jury question . . . . A criminally charged defendant has no entitlement to the luck of a lawless decision maker . . . . He has no right to insist that the jury be given a special opportunity to acquit him on the basis of nothing more than speculation, conjecture or compromise concerning a defense to the crime with which he is charged . . . . The trial court should be permitted to withhold defense of not guilty by reason of mental disease or defect, like other defenses, from the consideration of the jury when there is no evidence presented or there is insufficient evidence to present a jury question on the defense. It should be permitted to direct a verdict against the defendant if the judge finds there is no credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or defect by a

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preponderance of the evidence after giving the evidence the most favorable interpretation in favor of the accused asserting the defense.

124 Wis.2d 648, 662-63.

III. Abolition Of The Third Phase; Automatic Commitment To The Department

A. Overruling Of Kovach

Until 1984, the instructions included a preliminary and a final instruction for the third phase of the so-called "trifurcated trial." The third phase dealt with the present mental condition and the need for institutionalized care of a person who had been found not responsible by reason of mental disease or defect. The third phase was abolished by State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Field overruled State ex rel. Kovach v. Schubert, 64 Wis.2d 612, 219 N.W.2d 341 (1974), by holding that automatic commitment following a finding of not guilty by reason of mental disease or defect does not violate constitutional principles of due process or equal protection. The commitment is "to the department of health services for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony . . ." § 971.17(1)(b).

B. Commitment To An Institution Or Release On Conditions

Chapter 334, Laws of 1989, made further changes in the procedures relating to commitment. For offenses committed after January 1, 1991, commitment to an institution is no longer automatic. Rather, § 971.17(3) provides that the court must determine whether there shall be institutional care or conditional release. Conditional release shall be ordered unless the court "finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage." A series of factors are listed that the court may consider "without limitation because of enumeration":

- the nature and circumstances of the crime;
- the person's mental history and present mental condition;
- where the person will live;
- how the person will support himself or herself;
- what arrangements are available to ensure that the person has access to and will take necessary medication; and
- what arrangements are possible for treatment beyond medication.

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The meaning of "serious property damage" was discussed in State v. Brown, 2010 WI App 113, 328 Wis.2d 241, 789 N.W.2d 102. Pursuant to a plea agreement, Brown was found not guilty by reason of mental disease or defect on one charge of identity theft. She appealed her commitment for institutional care on the ground that "a significant risk of serious property damage" under § 971.17(3)(a) requires physical harm to an object. The court of appeals disagreed, holding that "property damage" is not limited to physical property damage:

> We discern no reason why the statute would seek to protect the public from physical injury or destruction of property, while subjecting it to the risk of the complete loss of goods, cash, or other assets. The injury suffered by a loss of property may be equal to or greater than that incurred from physical property damage, which may not completely devalue an item. ¶15.

The court agreed with the trial court's conclusion that Brown's extensive history of property crimes posed a significant risk of serious property damage if she would be conditionally released.

The commitment decision is to be made "pursuant to a hearing held as soon as practicable" after the second phase verdict is received. § 971.17(2)(a). If the court "lacks sufficient information to make the determination," a presentence report under § 972.15 or a supplementary mental examination, or both, may be ordered. § 971.17 (2)(a). Subsections (b) through (g) of § 971.17(2) outline the procedure for the supplementary mental examination.

If institutional care is ordered, the department places the person in either the Mendota or Winnebago Mental Health Institute.

C. Duration Of The Commitment

Whether the disposition is institutional care or conditional release, the commitment is to the Department of Health Services for "a specified period." The reference to "a specified period," added by Chapter 334, Laws of 1989, was a significant change from prior law. It allows the court to set a maximum period for the commitment that is less than the statutory maximum prison sentence for the offense. Further, it allows the court to exercise discretion in the multiple count case. Under prior law, multiple counts automatically resulted in consecutive commitments for the maximum term authorized for each count. If the crime involved carries a life term, the commitment period may be life, subject to the person's right to petition for release on conditions.

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The maximum commitment period varies depending on the time the offense was committed. For crimes committed before July 30, 2002, the specified period of the commitment shall not exceed 2/3 of the sentence that could have been imposed for the crime committed. § 971.17(1)(a). For crimes committed on or after July 30, 2002, the specified period of the commitment shall not exceed the maximum term of confinement of a bifurcated sentence that could be imposed for the crime committed. § 971.17(1)(b). Both maximum terms are subject to increases under applicable penalty enhancement statutes and reduction for sentence credit under § 973.155.

D. Commitment And Criminal Sentences

What to do when a person committed under § 971.17 is convicted for a new crime was addressed in State v. Szulczewski, 216 Wis.2d 494, 574 N.W. 660 (1998). The supreme court held that the § 971.17 commitment provides "legal cause" for possible stay of execution of sentence under § 973.15(8)(a). The sentencing court may exercise discretion in determining whether to stay execution of the new prison sentence, balancing the purposes of the commitment with the traditional purposes of criminal sentencing: deterrence, rehabilitation, retribution, and segregation.

A criminal sentence for a defendant in this situation cannot be ordered to run consecutively to the Chapter 971 commitment, because the commitment is not a "sentence." State v. Harr, 211 Wis.2d 584, 568 N.W.2d 307 (Ct. App. 1997). Thus, the judge sentencing in the new criminal case apparently has two options: impose sentence that will begin immediately, requiring that the defendant be transferred from the mental hospital to prison; or, stay the execution of the new criminal sentence in the exercise of discretion as suggested in Szulczewski.

IV. The Right Of A Committed Person To Refuse Medication

The Wisconsin Supreme Court has held that all involuntarily committed persons have the right to refuse psychotropic medication. State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987). This includes persons committed under § 971.17 as not guilty by reason of mental disease or defect. Persons can be compelled to submit to medication if the committing court issues an order which specifically permits it.

1989 Wisconsin Act 31 revised §§ 971.16 and 971.17 to provide for the findings required by the Jones decision. (See sections 2854d, 2854h, and 2856 of 1989 Wisconsin Act 31, effective date: August 9, 1989.) These revisions were reenacted by Chapter 334, Laws of

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1989. The other changes require the examiners to include findings regarding the medication issue in their reports, require the court to make a determination on the issue at the time of commitment, and establish a procedure for returning to court after commitment for a determination of competence to refuse medication.

The standard for evaluating competence to refuse medication is set forth in § 971.16(3):

> . . . The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantage of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:
>
> (a) The defendant is incapable of expressing an understanding of the advantages and disadvantage of accepting medication or treatment and the alternatives.
>
> (b) The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternative to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

In State v. Wood, 2010 WI 17, 323 Wis.2d 321, 780 N.W.2d 63, the Wisconsin Supreme Court rejected due process-based challenges to the involuntary medication statutes:

> ¶4 We are satisfied that Wis. Stat. § 971.17(3)(c) and AD-11-97 comport with the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution for two reasons. First, we conclude that due process does not require a finding of dangerousness to issue an order compelling involuntary medication of a person committed under Wis. Stat. Ch. 971. Even if due process required such a finding, there would be no violation because the statutory language of Wis. Stat. § 971.17(3)(c), along with AD-11-97, effectively provide for such a finding. Second, we conclude that due process requires periodic review of the compelled involuntary medication order, and that Wis. Stat. § 971.17(3)(c) and AD-11-97 satisfy that requirement as well.

Findings regarding refusal of medication may be necessary at the time the commitment decision is made (§ 971.17(3)(b)) or upon petition by the department regarding committed persons not subject to an order relating to refusal of medication (§ 971.17(3)(c)).

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The effect of imposing involuntary medication in a case where the insanity defense is interposed was discussed in Riggins v. Nevada, 504 U.S. 127 (1992). The Court reversed Riggins' conviction because the state trial court failed to make sufficient findings to support the forced administration of antipsychotic drugs during trial.

The Court held that the involuntary administration of Mellaril denied Riggins "a full and fair trial." The side effects of the drugs could impact Riggins' outward appearance, which is observed by the jury in evaluating the defendant's demeanor. And ". . . it is clearly possible that such side effects impacted . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." Further, a defendant has a liberty interest in freedom from unwanted antipsychotic drugs. The Court found the record insufficient to support a finding that these interests were outweighed by the need to accomplish an essential state policy, so the conviction was reversed.

It seems likely that Wisconsin's statute relating to forced medication must be interpreted in light of Riggins to require a specific finding that the need for the ordered medication outweighs the interests of the defendant that Riggins identifies.

V. Reexamination; Petition For Conditional Release

A. Crimes Committed Before January 1, 1991: Reexamination

A person committed as not guilty by reason of mental disease or defect for an offense occurring before January 1, 1991, may petition the committing court for reexamination of his "mental condition," § 971.17(2), 1987-88 Wis. Stats. There is a right to a jury at the reexamination hearing. State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 256 N.W.2d 531 (1977).

Reexamination hearings held for persons committed as not guilty by reason of mental disease or defect are not to be closed to the public and press without proper findings. Section 51.20(12) does not require such closure upon a simple request; it requires the same exercise of discretion as in other cases where closing the courtroom is an issue. State ex rel. Wisconsin State Journal v. Circuit Court, 131 Wis.2d 515, 389 N.W.2d 73 (Ct. App. 1986).

Section 971.17(2) was amended by supreme court order to allow the receipt of testimony over the telephone at the reexamination hearing: "Upon consent of all parties and approval by the court for good cause shown, testimony may be received into the record of the hearing by telephone or live audiovisual means." Order of the Wisconsin Supreme Court dated

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October 29, 1987. 141 Wis.2d xxi-xli. Also see Fullin and Williams, "Teleconferencing Comes To Wisconsin Courts, Wisconsin Bar Bulletin, January 1988.

1. Issue To Be Determined

The sole issue upon reexamination is the defendant's dangerousness; mental illness need not be established. State v. Gebarski, 90 Wis.2d 754, 280 N.W.2d 672 (1979).

2. Burden Of Proof

The burden of proof at the reexamination hearing is on the State to prove that the defendant cannot be safely discharged or released. State v. Gebarski, supra. The standard of proof is "to a reasonable certainty by evidence that is clear, satisfactory, and convincing." State v. Gladney, 120 Wis.2d 486, 355 N.W.2d 547 (Ct. App. 1984).

3. Jury Instructions

a. JI-Criminal 660

JI-660 is the preliminary instruction to be used at the beginning of the reexamination hearing. It advises the jury of the petitioner's status and identifies the issue the jury will be asked to decide.

b. JI-Criminal 661

JI-661 is the instruction to be used after evidence has been received at the reexamination hearing. It identifies the dangerousness of the petitioner as the sole issue for the jury to decide. The continued validity of dangerousness as the only criterion is discussed in note 2, JI-661. JI-661 identifies the three possible verdicts that may be returned: one providing that the petitioner be recommitted to the department; one providing for release on conditions to be determined by the court; and one providing for discharge. These three questions were identified as the ones to be submitted to the jury in State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 502, 256 N.W.2d 531 (1977).

c. JI-Criminal 662

JI-662 provides the actual verdict forms for use on reexamination. It assumes that a six-person jury will be used and that a five-sixths verdict is acceptable, both by analogy to reexamination procedures in civil commitment cases.

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B. Crimes Committed On Or After January 1, 1991: Petition for Conditional Release

For persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991, the right to reexamination is replaced by the right to petition for conditional release. Procedures are set forth in § 971.17(4) in great detail. There is no longer a general cross-reference to procedures in Chapter 51.

A petition for conditional release may be filed if at least six months have elapsed since the initial commitment order, the denial of the previous conditional release petition, or the revocation of conditional release. However, the director of the institution where the person is placed may file a petition on the person's behalf at any time.

A series of time limits apply once a timely petition is filed: within 20 days, one or more examiners shall be appointed; within 30 days of their appointment, the examiners shall file a written report; and within 30 days of the filing of the report, a hearing on the petition shall be held (unless the person waives the time limits). Testimony may be received at the hearing by telephone or live audio-visual means "upon a showing by the proponent of good cause under s. 807.13(2)(c)." Section 971.17(7)(d), created by Order of the Wisconsin Supreme Court, October 31, 1990.

After the hearing, "the court shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or others or of serious property damage if conditionally released." § 971.17(4)(d) The same list of factors applicable to the commitment decision are specified for consideration, "without limitation by enumeration," for application to the conditional release decision. In State v. Wenk, 2001 WI App 268, 248 Wis.2d 714, the court of appeals affirmed the denial of conditional release where the trial court found that the individual remained dangerous because he had a significant substance abuse problem which triggered previous bouts of mental illness and criminal conduct and that he had relapsed when previously released.

If the court grants conditional release, § 971.17(4)(e) provides that "the department of health services and the county department under § 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community." The statute specifies the topics that shall be addressed in the plan.

The statutory changes made by Chapter 334, Laws of 1989, also provided for a petition for termination of the commitment by a person who is on conditional release. The

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procedures and standards are spelled out in § 971.17(5) and parallel those that apply to the commitment and conditional release decisions. Section 971.17(6) provides for proceeding against the person under Chapter 51 at the expiration of the commitment.

C. Mental Illness And Dangerousness

The sole issue for reexaminations for pre-1991 cases and for petitions for conditional release for post-January 1, 1991, cases is the continued dangerousness of the committed person. The viability of this standard was in question following the decision of the United States Supreme Court in Foucha v. Louisiana, 504 U.S. 71 (1992). The uncertainty was resolved in favor of the standard in State v. Randall, 192 Wis.2d 800, 532 N.W.2d 94 (1995).

Foucha was found not guilty by reason of insanity under Louisiana statutes that are the rough equivalent of the procedures in place in Wisconsin. Both are based on the ALI Model Penal Code. He was committed to a mental institution. He could gain release by proving that he was no longer dangerous. In Louisiana, commitment is "indefinite" in the sense that the duration of mental commitment is not limited by the maximum prison sentence the defendant would have faced if convicted. Foucha, however, had been detained for 8 years at the time this litigation began; his maximum prison sentence if convicted would have been 32 years.

Foucha petitioned for release. Doctors indicated that he was not suffering from mental illness, but they could not "certify that he would not constitute a menace to himself or others if released." Based on this record, the trial court ruled that Foucha was "dangerous" and ordered him returned to the mental institution. The United States Supreme Court held that this statutory scheme was unconstitutional:

> In this case, Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. 504 U.S. 71, 78.

The Court reaffirmed that automatic commitment continues to be permissible after the finding of not guilty by reason of insanity: ". . . it could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed." 504 U.S. 71, 76. But that commitment apparently can continue only "until such time as he has regained his sanity or is no longer a danger to himself or society." 504 U.S. 71, 78.

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Wisconsin's procedure is the same as Louisiana's in one respect: automatic commitment with release only if the state fails to prove that the defendant remains dangerous. Lack of mental illness is not grounds for release if dangerousness continues. The latter was established in the Gebarski litigation. But Wisconsin limits the mental commitment to the maximum prison sentence that could have followed conviction, while Louisiana allows indefinite commitment.

In State v. Randall, the Wisconsin Supreme Court addressed the impact of Foucha on Wisconsin's commitment and release procedures. The court held that allowing the continued confinement of an insanity acquittee who is no longer mentally ill, solely on the grounds that the individual is a danger to himself, herself, or others, does not deny the individual due process:

> We hold that it is not a denial of due process for an insanity acquittee who has committed a criminal act to be confined in a state mental health facility for so long as he or she is considered dangerous, provided that the commitment does not exceed the maximum term of imprisonment which could have been imposed for the offense charged. We think the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the disposition set forth by the legislature in sec. 971.17(2), Stats. Furthermore, we believe that our decision here is not inconsistent with . . . Foucha v. Louisiana. . . . [W]e read Foucha to permit the continued confinement of dangerous but sane acquittees in a mental health facility, so long as they are treated in a manner consistent with the purposes of their commitment, e.g., there must be a medical justification to continue holding a sane but dangerous insanity acquittee in a mental health facility.
>
> . . . .
>
> . . . . Under Wisconsin's statutory scheme, the acquittee, once committed, is subject to treatment programs specifically designed to treat both mental and behavioral disorders. Treatment designed to reduce those behavioral disorders which render the individual dangerous may continue even after clinical signs of mental illness are no longer apparent. Such treatment is necessary to realize the ultimate goal of safely returning the acquittee into the community. Because this state's mental health facilities provide such comprehensive treatment we cannot conclude that it is punitive to continue an acquittee's confinement based on dangerousness alone. Rather, we conclude that there is a reasonable relationship between the commitment and the purposes for which the individual is committed and, therefore, that insanity acquittees are treated in manner consistent with the purposes of their commitment. 192 Wis.2d 800, 806-808.

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Thus, the court emphasized two aspects of the Wisconsin commitment scheme to distinguish it from the system reviewed in Foucha. First, the Wisconsin commitment is limited to the maximum term of criminal punishment that would have resulted if the offender had been convicted. Second, the acquittee continues to receive treatment appropriate to the purpose of the commitment, treatment which must go to the "behavioral disorder" or "behavioral disability" that makes the individual dangerous if the person is no longer clinically mentally ill. Under these circumstances, a single standard for continued commitment — based on dangerousness alone — is permissible.

The result of Wisconsin Supreme Court decision in Randall was a remand to the circuit court where Randall requested another reexamination in light of the standard the court established. He was denied release and appealed. The court of appeals found the jury instructions used on the second reexamination complied with due process. State v. Randall, 222 Wis.2d 53, 586 N.W.2d 318 (Ct. App. 1998).

COMMENT

This Introductory Comment was originally published in 1980 with the number 601-662. It was revised in 1982, 1984, 1988, 1989, 1990, 1992, 1995, and 2003. This revision was approved by the Committee in December 2010; it involved minor corrections and updating.

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601 INSTRUCTION PRIOR TO TRIAL UPON A PLEA OF NOT GUILTY JOINED WITH A PLEA OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

The Defendant's Two Pleas

The defendant, (name of defendant), has entered two pleas to the charge of (charge): not guilty and not guilty by reason of mental disease or defect.[1]

Two Phase Trial

The law requires that the issues raised by the two pleas be decided in a continuous trial that is separated into two phases.[2] Your verdict will be taken at the end of each phase. You are to consider only the issues presented to you during each phase. You are not to consider any issues other than those presented to you for each verdict.

CONTINUE WITH THE FOLLOWING IF A COMPLETE DESCRIPTION OF THE TWO PHASES IS DESIRED:[3]

The First Phase

In the first phase of this trial, you will be asked to determine whether the defendant is guilty of the charge of (charge). You will make this determination solely upon the facts which deal with the actual incident alleged in the information. During this first phase, you will not be asked to determine whether at the time of the incident the defendant was suffering from mental disease or defect.

If, after the first phase of the trial, you find the defendant not guilty, the trial will be over. If you find the defendant guilty, the trial will move to a second phase.

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The Second Phase

During the second phase, you will be asked to determine whether the defendant is responsible for criminal conduct. Wisconsin law provides that a person is not responsible for criminal conduct if, at the time it was committed, the person had a mental disease or defect and as a result lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform the conduct to the requirements of law. If the trial proceeds into this second phase, you will be instructed more fully as to your duties at that time.

We will now begin the first phase of the trial. I again caution you that this first phase is concerned solely with the question of whether the defendant committed the crime of (charge) as set forth in the information.

EVIDENCE TAKEN ON THE ISSUE OF GUILT.

COMMENT

Wis JI-Criminal 601 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 601 and comment were originally published in 1980, revised in 1984, and republished without change in 1988 and 1990. The 2003 revision involved adoption of the new format and changes in the text. It was republished without change in 2011.

1. This instruction is drafted for use where the plea is based on the presence of a mental disease or mental defect. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive — mental disease and defect — since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense; and to use "and/or" would not have been desirable.

2. Informing the jury of the two phases of the trial is required by § 971.165(1)(b).

3. In the Committee's judgment, the first two paragraphs of the instruction are sufficient to advise the jury of the nature of the two phases of the bifurcated trial. The rest of the instruction is considered to be optional, for use where the judge wishes to give a more complete description.

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602 INSTRUCTION AFTER EVIDENCE HAS BEEN RECEIVED ON ISSUE OF GUILT WHERE A PLEA OF NOT GUILTY HAS BEEN JOINED WITH A PLEA OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

THE FOLLOWING MAY BE ADDED TO WIS JI-CRIMINAL 100 — OPENING INSTRUCTION — OR GIVEN FOLLOWING THE INSTRUCTION ON THE OFFENSE CHARGED

In this first phase of the trial, you have heard evidence that dealt solely with the defendant's conduct during the alleged incident. You are to determine only whether the defendant is guilty of the charge of (charge). If you find the defendant not guilty, the trial will be over. If you find the defendant guilty, the trial will proceed to the second phase, where you will determine whether the defendant was not responsible by reason of mental disease or defect.

COMMENT

Wis JI-Criminal 602 is part of a series of instructions which replaced the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 602 was originally published in 1980. The Comment was revised in 1982 and 1984, and republished without change in 1988, 1990, and 2003. The 2003 revision involved adoption of the new format and changes in the text. It was republished without change in 2011.

This instruction is intended to be used at the end of the first phase of the trial, either as part of the opening instruction (Wis JI-Criminal 100) or as an introductory paragraph to the instruction for the offense charged.

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603 PRELIMINARY INSTRUCTION AFTER FINDING OF GUILT AND BEFORE CONSIDERATION OF WHETHER THE DEFENDANT SUFFERED FROM A MENTAL DISEASE OR DEFECT AT THE TIME OF THE OFFENSE

The defendant has been found guilty[1] of (offense) .

IF THE FIRST PHASE WAS RESOLVED WITH A PLEA OF GUILTY OR NO CONTEST, ADD THE FOLLOWING:

[The elements of (offense) are:

SPECIFY THE ELEMENTS OF THE CRIME BY REFERRING TO THOSE LISTED IN THE APPLICABLE JURY INSTRUCTION.[2]]

We will now proceed with the second phase of this trial. During the second phase, you will be asked to determine whether the defendant is not responsible by reason of mental disease or defect.[3]

The Defendant's Burden of Proof

Before you may find that the defendant is not responsible for the criminal conduct, the defendant must satisfy you to a reasonable certainty by the greater weight of the credible evidence[4] that at the time the crime was committed, the defendant had a mental disease or defect and as a result lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law.

Two Questions

This issue will be presented to you in the form of two questions.[5]

1. At the time the crime was committed, did the defendant have a mental disease or defect?

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2. As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

You will be asked to answer the second question only if you answer the first question "yes."

If you find that the defendant is not responsible for the criminal conduct, the defendant will be committed to the custody of the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to (himself) (herself) or to others if released under conditions ordered by the court.[6] The only issue at this second phase of the trial is the defendant's mental condition at the time of the offense.

PROCEED WITH EVIDENCE ON THE DEFENDANT'S MENTAL CONDITION AT THE TIME OF THE OFFENSE.

COMMENT

Wis JI-Criminal 603 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 603 and comment were originally published in 1980 and revised in 1982, 1984, 1988, 1990, 2002, and 2005. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

This instruction is for the second stage of the trial held upon the defendant's special plea of not guilty by reason of mental disease or defect. The second stage is to be held before the same jury that found that the defendant committed the crime, except that a new jury may be drawn if the jury has been discharged before reaching a verdict on the second plea or if an appellate court has reversed the judgment as to the second plea but not the first. § 971.165(1)(c)2. and 3. Also see State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979); State v. Grennier, 70 Wis.2d 204, 234 N.W.2d 316 (1975). If the defendant coupled a guilty plea with the special plea, a jury would have to be convened if one is requested on the issue of criminal responsibility. The usual procedures for accepting a guilty plea should have been followed to assure that the plea was

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voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

The Wisconsin statutes relating to mental responsibility were modeled after Section 4.01 of the ALI Model Penal Code. The Commentary to Section 4.01 is found in Tentative Draft No. 4, beginning at page 156.

1. This instruction is drafted for use before the second phase of the trial begins. It may be used not only where the first phase was tried to the jury but also where the judge sitting without a jury heard the first phase and where the defendant coupled a plea of guilty or no contest with the plea of not guilty by reason of mental disease or defect. See note 2, below.

2. The committee recommends advising the jury of the elements of the crime that were established at the first phase by a plea of guilty or no contest. This will put the jury in a position similar to that of a jury that made the decision in a case where the first phase was tried to a jury. Just listing the elements as they appear in the applicable instruction is sufficient.

3. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive — mental disease and defect — since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense. And to use "and/or" would not have been desirable.

4. This burden of proof is required by § 971.15(3).

5. The Committee determined that separating the issue into two questions would make the requirements clearer for the jury. Presenting the issue in the form of two questions is intended to make clear that not only must a mental disease or defect be present at the time of the offense but also that the mental disease or defect must have had the required effect on the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

6. The instruction's description of what will happen to the defendant if found not responsible is based on § 971.165(2) which directs that the result be described to the jury and reads as follows:

> (2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

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605 INSTRUCTION ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY — MENTAL DISEASE OR DEFECT[1]

You have just heard testimony about the defendant's mental condition at the time of the offense. You will now be asked to determine whether the defendant is not responsible by reason of mental disease or defect.[2]

Two Questions

This issue will be presented to you in the form of two questions.[3]

1. At the time the crime was committed, did the defendant have a mental disease or defect?
2. As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

You will be asked to answer the second question only if you answer the first question "yes."

The Defendant's Burden of Proof

Before you may answer a question "yes," the defendant must satisfy you to a reasonable certainty by the greater weight of the credible evidence[4] that the answer to that question should be "yes."

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[5]

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The First Question

The first question is: At the time the crime was committed, did the defendant have a mental disease or defect?

Meaning of "Mental Disease or Defect"

Mental disease or defect is an abnormal condition of the mind which substantially affects mental or emotional processes.[6]

The term "mental disease or defect" identifies a legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect to which the witnesses may have referred.[7]

You should not find that a person is suffering from a mental disease or defect merely because the person committed a criminal act, or because of the unnaturalness or enormity of the act, or because a motive for the act may be lacking.[8]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE

[Temporary passion or frenzy prompted by revenge, hatred, jealousy, envy, or the like does not constitute a mental disease or defect.][9]

[An abnormality manifested only by repeated criminal or otherwise antisocial conduct does not constitute a mental disease or defect.][10]

[A voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease or defect.][11]

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[A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental disease or defect.][12]

[Chronic use of drugs or alcohol may produce a condition that can constitute a mental disease or defect if the condition has become permanent.][13]

Jury Decision on the First Question

If you answer the first question "yes," you must go on to answer the second question. If you answer the first question "no," you should not consider the second question.

The Second Question

The second question is: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?[14]

If You Answer Both Questions "Yes"

If you answer both of these questions "yes," the defendant will be found to be not responsible for the offense, and will be committed to the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to (himself) (herself) or to others if released under conditions ordered by the court.[15] In deciding whether the defendant is responsible for the criminal conduct, you are to consider only the issue of the defendant's mental condition at the time the offense was committed.

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Verdict

Agreement by ten or more jurors is sufficient to become the verdict of the jury.[16] Jurors have a duty to consult with one another and to deliberate for the purpose of reaching agreement. At least the same ten jurors should agree in all the answers made. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

Wis JI-Criminal 605 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 605 and comment were originally published in 1980 and revised in 1982, 1984, 1988, 1990, and 2003. The 2003 revision involved combining both mental disease and mental defect in a single instruction, adoption of the new format and changes to the text. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

This instruction is for the second stage of the trial held upon the defendant's special plea of not guilty by reason of mental disease or defect. The second stage is to be held before the same jury that found that the defendant committed the crime, except that a new jury may be drawn if the jury has been discharged before reaching a verdict on the second plea or if an appellate court has reversed the judgment as to the second plea but not the first. § 971.165(1)(c)2. and 3. Also see State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979); State v. Grennier, 70 Wis.2d 204, 234 N.W.2d 316 (1975). If the defendant coupled a guilty plea with the special plea, a jury would have to be convened if one is requested on the issue of criminal responsibility. The usual procedures for accepting a guilty plea must have been followed to assure that the plea was voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

In State v. Leach, 124 Wis.2d 648, 370 N.W.2d 240 (1985), reversing (as to this issue) 122 Wis.2d 339, 363 N.W.2d 234 (Ct. App. 1984), the Wisconsin Supreme Court held that the defendant may be held to a burden of producing sufficient evidence on the responsibility issue before it need be submitted to the jury. See page 5 of the Introductory Comment that precedes Wis JI-Criminal 601.

1987 Wisconsin Act 86 (effective date: November 28, 1987) created § 971.165(2) which provides that a five-sixths verdict applies at the second phase.

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Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

See Wis JI-Criminal 605B for a suggested verdict form.

In State v. Wery, 2007 WI App 169, 304 Wis.2d 355, 737 N.W.2d 66, the court of appeals held that the regular rule against impeaching a jury's verdict applies to the verdict returned after the first phase of the trial. After the first phase, the jury was polled and each juror indicated that "guilty" was his or her verdict. After deliberations for the second phase had begun, the foreperson informed the court that one of the jurors disagreed with the guilty verdict. The court of appeals held that the defendant "fails to persuade us that the traditional rules barring impeachment of a jury verdict in instances of juror remorse do not apply in a bifurcated setting." Wery, ¶18.

The Wisconsin statutes relating to mental responsibility were modeled after section 4.01 of the ALI Model Penal Code. The Commentary to section 4.01 is found in Tentative Draft No. 4, beginning at page 156.

1. This instruction is drafted for use where the plea is based on the presence of a mental disease or mental defect. Former Wis JI-Criminal 605A, which provided a separate instruction for cases involving "mental defect" has been withdrawn and combined with this instruction. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive — mental disease and defect — since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense. And to use "and/or" would not have been desirable.

2. The Committee determined that phrasing the issue in terms "responsible or not responsible" is preferable to "guilty but not guilty by reason of mental disease or defect."

3. The Committee determined that separating the issue into two questions would make the requirements clearer for the jury. Presenting the issue in the form of two questions is intended to make clear that not only must a mental disease or defect be present at the time of the offense but also that the mental disease or defect must have had the required effect on the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

4. This burden of proof is required by § 971.15(3).

5. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

6. This definition of was arrived at after considerable discussion. The previous Wisconsin instructions had no definition of "mental disease or defect" nor does the section of the ALI Model Penal Code after which the Wisconsin statute was modeled have a definition. (See Comment to § 4.01, ALI Model Penal Code, Tent. Draft No. 4.) The 2002 revision changed the former instruction to refer to "mental disease or defect."

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The definition in the instruction was adapted from the one proposed by the court in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The Brawner case is the leading attempt to define "mental disease or defect" and has been the model for most other attempts to do so although relatively few states or federal courts have developed a definition.

The Committee determined that a positive definition should be attempted, in addition to the negative statements that have been retained from the prior instructions. (For example, "Temporary passion . . . does not constitute a mental disease or defect.") The only indication in Wisconsin law of what is a mental disease or defect is a decision of the Wisconsin Supreme Court holding that psychomotor epilepsy may be legally classified as a mental disease or defect. Sprague v. State, 52 Wis.2d 89, 187 N.W.2d 784 (1971).

The Committee did consider the definition of "mental illness" provided in Wis. Stat. § 51.01(13)(b) but concluded it was not well-suited for the purposes of this instruction. However, in a proper case, there may be merit in including the references to "thought, mood, perception, orientation, or memory" that are found in § 51.01(13)(b). Psychiatrists rely on symptoms affecting these mental functions to determine whether or not mental illness is present. If expert testimony is linked directly to such functions, it may be helpful to the jury to tailor an instruction to coincide with the testimony.

The "mental disease or defect" definition is intentionally broad. Disabilities may qualify under this definition that are not sufficient to relieve the defendant of responsibility. The limits are furnished by the second question in the instruction, which requires that the mental disease or defect have the effect of substantially impairing the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The Committee reviewed the definition in 1984 and reaffirmed it with the exception of deleting the following phrase which formerly concluded the definition: "and can impair behavioral controls." The deleted phrase was found to serve no useful purpose. As revised, the definition closely resembles the definition set forth in the ABA Criminal Justice Mental Health Standards. Approved by the ABA in August 1984, standard 7.6.1 provides:

> (b) When used as a legal term in this standard "mental disease or defect" refers to:
> (i) impairments of mind, whether enduring or transitory; or,
> (ii) mental retardation,
> either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense.

The definition adopted in the instruction has been criticized as too "wide-open." However, the Committee concluded that using the definition to limit the admissibility of evidence was inappropriate, especially in the absence of legislative action. Long-established Wisconsin case law holds: ". . . no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense." State v. Carlson, 5 Wis.2d 595, 607, 93 N.W.2d 354 (1958); cited with approval in Esser v. State, 16 Wis.2d 567, 593-94, 115 N.W.2d 505 (1962). These cases preceded the adoption of the ALI tests in Wisconsin but were cited in support of that adoption: Since any evidence of mental disease or defect, regardless of medical label, was admissible, it was fair to impose the burden of persuasion on the defendant. Consistent with this principle, the Committee concludes that the proper way to limit inappropriate evidence is to apply the standards for relevancy used in all other situations: Is the proffered testimony relevant to the

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issue of the defendant's ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law? A recent federal case has emphasized this as the proper approach, United States v. Gould, 741 F.2d 45 (4th Cir. 1984).

The Committee continues to place great importance on the concept that medical terms and labels are not the central issue, it is the legal conclusion that is significant: Regardless of the medical label, did the mental disease or defect have the required effect on the accused person's behavior? It is this aspect that is emphasized in the second question in the instruction.

7. This is adapted from United States v. Brawner, cited above, note 6. The intent of this sentence is to emphasize that the jury is not bound by what is considered "mental disease or defect" for medical purposes. The jury is bound by the legal definition of mental disease or defect as explained in this instruction. In a proper case, the judge may wish to emphasize this distinction.

8. This paragraph, or at least a modified version, is probably appropriate for almost all cases. The paragraphs which follow, identifying conditions which do not constitute mental disease for the purpose of determining criminal responsibility, may be read in all cases or just in those cases where the condition discussed is raised by the evidence. The reason for reading each paragraph in all cases is that a complete picture of what is not considered a mental disease may help the jury to better understand what is included in that concept.

9. Duthey v. State, 131 Wis. 178, 111 N.W. 222 (1907).

10. See § 971.15(2) and Simpson v. State, 62 Wis.2d 605, 215 N.W.2d 435 (1974). The instruction follows the words of § 971.15(2) in referring to "an abnormality manifested only by repeated criminal or otherwise antisocial conduct." (Emphasis added.) In State v. Werlein, 136 Wis.2d 445, 401 N.W.2d 848 (Ct. App. 1986), the court of appeals held that a trial judge improperly invoked the statute in excluding evidence offered by the defendant. The decision hinged on the word "only." Because the proffered testimony was based on organic brain dysfunction and delusions in addition to antisocial conduct, the court held the § 971.15(2) exception did not apply. A case-by-case analysis is required (even where, as in Werlein, the expert witness characterized the mental disease as "antisocial personality disorder").

Like the Wisconsin mental responsibility test in general, the exclusion of the "antisocial personality" from the mental disease definition is modeled after section 4.01 of the ALI Model Penal Code. The Commentary to the Model Penal Code explains this exclusion as follows:

> Paragraph (2) of section 4.01 is designed to exclude from the concept of "mental disease or defect" the case of so-called "psychopathic personality." The reason for the exclusion is that, as the Royal Commission put it, psychopathy "is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality." While it may not be feasible to formulate a definition of "disease," there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. Although British psychiatrists have agreed, on the whole, that psychopathy should not be called "disease," there is considerable difference of opinion on the point in the United States. Yet it does not seem useful to contemplate the litigation of what is essentially

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> a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind.

Commentary to section 4.01, ALI Model Penal Code (Tentative Draft No. 4, page 160).

11. Gibson v. State, 55 Wis.2d 110, 197 N.W.2d 813 (1972).

12. State v. Kolisnitschenko, 84 Wis.2d 492, 267 N.W.2d 321 (1978): a temporary psychotic state brought about by the interaction of a "stormy personality" and voluntary intoxication and which lasts only for the period of intoxication does not constitute a mental disease or defect.

13. State v. Kolisnitschenko, see note 12, supra.

14. It is sufficient that the mental disease or defect had either of the two specified effects on the defendant: impairment of capacity to appreciate the wrongfulness of the conduct or impairment of capacity to conform his conduct to the requirements of law.

15. The instruction's description of what will happen to the defendant if found not responsible is based on § 971.165(2) which directs that the result be described to the jury and reads as follows:

> (2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

16. Section 971.165 (created by 1987 Wisconsin Act 86 — effective date: November 28, 1987) provides that a five-sixths verdict applies. State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), held that a five-sixths verdict applied even before the statute was changed.

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605A INSTRUCTION ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY (Mental Defect)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 605A was originally published in 1980 and revised in 1984, 1988, 1990 and 1992. It was withdrawn by the Committee in October 2002.

This instruction was withdrawn because the Committee concluded that it was not necessary to have a separate instruction for "mental defect." Rather, "mental defect" has been included in Wis JI-Criminal 605, where the term "mental disease or defect" is used throughout.

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605B VERDICT: NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT

Question 1: At the time the crime was committed, did the defendant have a mental disease or defect?

Answer: _____
Yes or No

If you answer "yes" to question 1, answer question 2.

Question 2: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

Answer: _____
Yes or No

Dissenting Juror(s): _____ as to Question(s) _____

_____ as to Question(s) _____

COMMENT

Wis JI-Criminal 605B was originally approved by the Committee in October 2002. It was republished without change in 2011.

This provides a suggested verdict for the jury's finding at the second stage of the bifurcated trial.

The verdict should be changed to refer to "mental disease and defect" if the plea is based on the combined effect of a mental disease and a mental defect. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive — mental disease and defect — since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense; and to use "and/or" would not have been desirable.

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606 PRELIMINARY INSTRUCTION UPON A FINDING OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

607 INSTRUCTION ON COMMITMENT FOLLOWING A FINDING OF NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 606 and 607 were published in 1980. They were withdrawn by the Committee in 1984. This withdrawal note was republished without change in 1988. The second paragraph below was added in 1990. The note was republished without change in 2011.

These instructions were a preliminary and a final instruction for the third phase of the so-called "trifurcated" trial, held upon a plea of not guilty by reason of mental disease or defect. The third phase dealt with the issue of the present mental illness and need for institutionalized care of a person who had been found not responsible by reason of mental disease or defect. The third phase was abolished by State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Field overruled State ex rel. Kovach v. Schubert, 64 Wis.2d 612, 219 N.W.2d 341 (1974), by holding that automatic commitment following a finding of not guilty by reason of mental disease or defect does not violate constitutional principles of due process or equal protection.

Chapter 334, Laws of 1989, made further changes in the procedures relating to commitment. For offenses committed after January 1, 1991, commitment to an institution is no longer automatic. Rather, § 971.17(3) provides that the court must determine whether there shall be institutional care or conditional release. Conditional release shall be ordered unless the court "finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage." See the discussion in the Introductory Comment, Wis JI-Criminal 600.

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640 MENTAL DISEASE OR DEFECT: EXPERT[1] OPINION TESTIMONY

Statutory Definition of the Crime

Ordinarily, a witness may testify only about facts. However, a witness with specialized knowledge in a particular field may give an opinion in that field.

In determining the weight to give to this opinion, you should consider:

- the qualifications and credibility of the witness;
- the facts upon which the opinion is based; and
- the reasons given for the opinion.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion.

[CONTINUE WITH THE FOLLOWING IF EXPERTS HAVE GIVEN CONFLICTING TESTIMONY.]

[In resolving conflicts in opinion testimony, weigh the different opinions against each other. Also consider the qualifications and credibility of the witnesses and the facts supporting their opinions.]

ADD THE FOLLOWING IF AN EXPERT WHO HAS BEEN APPOINTED BY THE COURT UNDER § 971.16(2) HAS TESTIFIED

[The court has appointed (name) to examine the defendant and to testify at trial. You should weigh the testimony of (name) as you would any other opinion testimony.]

COMMENT

This instruction was originally published as "JI 640-CPC" in 1971. It was revised and republished as Wis JI-Criminal 640 in 1988, republished with an editorial change in 1990, and revised in 2003 and 2011.

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This revision was approved by the Committee in October 2018; it eliminated the use of the word "expert" in the text of the instruction.

Except for the last paragraph, this instruction is identical to Wis JI-Criminal 200. The last paragraph of the instruction is intended to implement § 971.16(2) which provides in part: "The fact that the physician or psychologist has been appointed by the court shall be made known to the jury and the physician or psychologist shall be subject to cross-examination by both parties." The purpose of the appointment under this statute is to provide the court with a neutral and independent expert. See State v. Burdick, 166 Wis.2d 785, 480 N.W.2d 528 (Ct. App. 1992), below.

The 2019 revision modified the text to eliminate the use of the word "expert" to describe the witness. The change was made to address the risk of "judicial vouching," a term used to describe the idea that the jury may give undue deference to the opinion of a witness whom the judge has called an "expert." The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see, the report of the National Commission on Forensic Science titled "Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

The United States Supreme Court addressed the defendant's right to a court-appointed expert in Ake v. Oklahoma, 470 U.S. 68 (1985). The court held that when a defendant's sanity at the time of the offense has been shown to be "likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist's assistance . . . if the defendant cannot otherwise afford one." Though announced in a capital case, the holding was not limited to those cases. The type of expert assistance approved was also stated broadly: "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

The interplay between the appointment of an expert under § 971.16(2) and the right to an appointed expert under the Ake decision was addressed in State v. Burdick, 166 Wis.2d 785, 480 N.W.2d 528 (Ct. App. 1992). The court affirmed the right that Ake recognized, but held that § 971.16(2) "is not the statutory vehicle by which a trial court must satisfy the constitutional obligation laid down by the Ake court." 166 Wis.2d 785, 790. Rather, the statute's purpose "is to provide the court . . . with the means of obtaining 'some evidence in the case, not bought and paid for, coming from impartial witnesses who owe no duty or allegiance to either side of the controversy.'" 166 Wis.2d 785, 792, quoting Jessner v. State, 202 Wis. 184, 193, 231 N.W. 634 (1930). [Note: the Burdick decision referred to subsec. (1) of § 971.16, 1989-90 Wis. Stats. That subsection was renumbered as § 971.16(2) by 1991 Wisconsin Act 39.]

1. Although the 2019 revision removed the word "expert" from the text of the instruction (see discussion in the Comment preceding this footnote) it was retained in the title so that the instruction would continue to be easy to find. The Committee recommends that the title not be included in the written instructions that are provided to the jury.

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650 ADVICE TO A PERSON FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

THE FOLLOWING SHOULD BE READ TO A PERSON WHO IS FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT AND COMMITTED TO THE DEPARTMENT OF HEALTH SERVICES

"The court is required to inform you that Section 941.29 of the Wisconsin Statutes provides that if you possess a firearm at any time after being found not guilty of a felony by reason of mental disease or defect you may be sentenced to a term of imprisonment not to exceed 10 years or to pay a fine not to exceed $25,000, or both.[1]

INCLUDE THE FOLLOWING IF THE PERSON HAS BEEN FOUND NOT GUILTY OF A VIOLENT FELONY BY REASON OF MENTAL DISEASE OR DEFECT[2]

["The court is required to inform you that Section 941.291 of the Wisconsin Statutes provides that if you possess a body armor at any time after being found not guilty of a violent felony by reason of mental disease or defect you may be sentenced to a term of imprisonment not to exceed 15 years or to pay a fine not to exceed $50,000, or both.]

"The court has ordered that you be committed to the Department of Health Services and placed in an institution for the reason that you have been found not guilty of _(name of crime)_ by reason of mental disease or defect. You have the right to appeal the finding that you committed _(name of crime)_.[3] You also have the right to appeal this court's decision to place you in an institution.[4] And you have the right to ask the court to order that you be released from the institution on conditions after you have been there for at least six months.[5]

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"You should discuss all of these matters with your attorney. Your attorney is directed to explain these rights to you and to take all necessary actions on your behalf to assure that any rights you wish to pursue are preserved."

COMMENT

This was originally published as SM-50A in 1974 and was revised in 1980 and 1990. It was revised and renumbered as JI 650 in 2004. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

With the exception of the advice regarding possession of a firearm and body armor (see notes 1 and 2, below), the advice provided here is not explicitly required by statute or case law. However, the Committee recommends that it be given, since similar advice is required for all defendants convicted of criminal offenses. See § 973.18(2) and SM-33, INFORMATION ON POSTCONVICTION RELIEF.

1. Section 971.17(1g) requires that "the court shall inform the defendant of the requirements and penalties under s. 941.29." Section 941.29(1) and (2) provide that it is a Class G felony for a person "found not guilty of a felony in this state by reason of mental disease or defect" to possess a firearm. Subsection (7) of that statute provides that the section does not apply if a court subsequently determines that the person is no longer insane or no longer has a mental disease, defect, or illness and is not likely to act in a manner dangerous to public safety. The recommended advice in this instruction does not include the exception described in subsection (7).

2. Section 971.17(1h) requires that "[if] the defendant . . . is found not guilty of a violent felony, as defined in s. 941.291(1)(b), by reason of mental disease or defect, the court shall inform the defendant of the requirements and penalties under s. 941.291." Section 941.291 provides that it is a Class E felony for a person to possess body armor if the person "has been found not guilty of a violent felony in this state by reason of mental disease or defect." § 941.291(2)(d) and (3).

3. Section 971.165(3)(b) provides that a judgment of not guilty by reason of mental disease or defect "is interlocutory to the commitment order under s. 971.17 and reviewable upon appeal therefrom."

4. The standards for commitment to an institution are found in § 971.17(3)(a). If there is a claim that the standards were not met, it is assumed that the claim would be raised in an appeal from the commitment order. Section 971.165(3)(b) refers to appeal from that order. See note 3, supra.

5. The standards and procedures for a petition for conditional release are set forth in § 971.17(4)(a). Conditional release replaces reexamination under the former statutes. See Wis JI-Criminal 660-662.

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655-CPC EFFECT OF FINDING OF NOT GUILTY BECAUSE OF MENTAL DISEASE OR DEFECT

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 655-CPC was originally published in 1971. It was withdrawn in 1983. Its substance has been incorporated into Wis JI-Criminal 603 and 605. This note was republished without change in 1988, 1990, and 2011.

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THIS INSTRUCTION APPLIES ONLY TO REEXAMINATIONS CONDUCTED FOR PERSONS ADJUDICATED NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT FOR OFFENSES COMMITTED PRIOR TO JANUARY 1, 1991.[1]

660 PRELIMINARY INSTRUCTION: REEXAMINATION OF PERSON COMMITTED AS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT [§ 971.17(2)]

[THIS INSTRUCTION IS TO BE GIVEN TO THE JURY AT THE BEGINNING OF THE HEARING HELD TO REEXAMINE A PERSON COMMITTED AS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT.]

The petitioner, (name), has requested a reexamination of his mental condition as provided by Wisconsin law. The petitioner was found to have committed a criminal offense but was found to be not responsible because he suffered from a mental disease or defect at the time of the offense. Following his trial, he was committed to the custody of the Wisconsin Department of Health Services.

The purpose of this hearing is to determine whether the petitioner, (name), may be safely discharged or released on conditions without danger to himself or to others, or whether he should be recommitted to the Wisconsin Department of Health Services to be placed in an appropriate institution for continued custody, care, and treatment.[2] After hearing the testimony, you will be asked to make this determination.

COMMENT

Wis JI-Criminal 660 was originally published in 1980 and revised in 1984. It was republished without change in 1988 and revised in 1990 and 1992. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

1. Chapter 334, Laws of 1989, changed reexamination procedures for persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991. The right to reexamination

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is replaced by the right to petition for conditional release. See the discussion at Wis JI-Criminal 600, Introductory Comment. Reexamination procedures addressed by Wis JI-Criminal 660-662 continue to apply to persons committed for offenses occurring before January 1, 1991. § 971.17(8).

2. State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 259 N.W.2d 531 (1977). The continued viability of the Gebarski dangerousness standard is open to question. See the discussion of Foucha v. Louisiana, United States Supreme Court, May 18, 1992, in Wis JI-Criminal 600, Introductory Comment, at V.,C., and in the comment to Wis JI-Criminal 661.

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THIS INSTRUCTION APPLIES ONLY TO REEXAMINATIONS CONDUCTED FOR PERSONS ADJUDICATED NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT FOR OFFENSES COMMITTED PRIOR TO JANUARY 1, 1991.[1]

661 REEXAMINATION UNDER § 971.17(2)[2]

In this proceeding, (name of petitioner) has petitioned this court for reexamination of his mental condition[3] as he has a right to do under the law.

The issue raised by his petition is whether he may be safely discharged or released without danger to himself or others.[4]

The burden is on the State[5] to prove that (name of petitioner) cannot be safely discharged or released without danger to himself or others.

(Name of petitioner) need not prove that he can be safely discharged or released without danger to himself or others, and you are not to assume merely from the fact that he is confined at (name of institution) that he is presently a danger to himself or others. The State must convince you to a reasonable certainty by evidence which is clear, satisfactory, and convincing[6] that (name of petitioner) cannot be safely discharged or released without danger to himself or others.

The following three forms of verdict[7] will be submitted to you for your consideration:

One reading: "We, the jury, find (name of petitioner) should be recommitted to the custody of the department at an appropriate institution."

If you decide on this verdict, (name of petitioner) will be returned to an appropriate institution under his present status.

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Another verdict reading: "We, the jury, find (name of petitioner) may be safely released upon such conditions as the court deems necessary."[8]

If you decide on this verdict, (name of petitioner) will remain in the legal custody of the department but will be released from the (name of institution) under such conditions deemed appropriate by this court.

Another verdict reading: "We, the jury, find (name of petitioner) may be safely discharged from the custody of the department."

If you decide on this verdict, (name of petitioner) will be released without restriction and will have his complete freedom as far as this case is concerned.

It is for you to determine which one of the forms of verdicts submitted you will bring in as your verdict.

The law provides that, in this case, the verdict is valid only if at least five (5)[9] members of the jury have agreed to it.

COMMENT

Wis JI-Criminal 661 was originally published in 1980 and revised in 1984, 1988, 1990, and 1992. It was republished without substantive change in 2011.

1. Chapter 334, Laws of 1989, changed reexamination procedures for persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991. The right to reexamination is replaced by the right to petition for conditional release. See the discussion at Wis JI-Criminal 600, Introductory Comment. Reexamination procedures addressed by Wis JI-Criminal 660-662 continue to apply to persons committed for offenses occurring before January 1, 1991. § 971.17(8).

2. This instruction is recommended for use when a person committed as not guilty by reason of mental disease or defect receives a hearing on his petition of reexamination under § 971.17(2). The petitioner has the right to a jury at such a hearing, State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d

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489, 259 N.W.2d 531 (1977); at the hearing, the state has the burden of going forward with the evidence and the burden of proof. The only issue at the hearing is the defendant's dangerousness, see note 4 below.

Section 971.17(2) was amended by supreme court order to allow the receipt of testimony over the telephone at the reexamination hearing: "Upon consent of all parties and approval by the court for good cause shown, testimony may be received by telephone or live audiovisual means." Order of the Wisconsin Supreme Court dated October 29, 1987. 141 Wis.2d xxi-xli. Also see Fullin and Williams, "Teleconferencing Comes To Wisconsin Courts," Wisconsin Bar Bulletin, January 1988.

Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

The instruction assumes that the petition is filed by one who is confined in an institution and is seeking discharge or release on conditions. However, a person already released on conditions may also file a petition to seek outright release. In such a case, this instruction would have to be modified to accurately reflect the petitioner's status.

If the department wishes to transfer a person committed under § 971.17 to the care of a community board established under § 51.42 or § 51.437, the approval of the committing court must be obtained. See § 51.37(4).

3. Section 971.17(2) refers to this proceeding as a "reexamination of a defendant's mental condition." (Emphasis added.) Therefore, this phrase has been retained in the instruction even though the sole issue at the reexamination is dangerousness, and present mental illness need not be established. See State v. Gebarski, 90 Wis.2d 754, 280 N.W.2d 672 (1979).

4. In the second Gebarski decision, cited above, note 3, the Wisconsin Supreme Court held that dangerousness was the only issue on reexamination; the establishment of mental illness is required neither by statute (90 Wis.2d 754 at 761-68) nor by principles of equal protection and due process (90 Wis.2d 754 at 769-73).

Gebarski was decided at a time when Wisconsin law required that a finding of present mental illness and dangerousness be made before a defendant could be committed after being found not responsible by reason of mental disease or defect. This third phase of the "trifurcated" trial was abolished by the Wisconsin Supreme Court in State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Because the procedures for commitment have changed, it is possible that the continued validity of the Gebarski standards for reexamination is open to question.

The Field decision upheld the automatic commitment of one found not guilty by reason of mental disease. In doing so, it relied heavily on a decision of the U.S. Supreme Court, Jones v. United States, 463 U.S. 354 (1983). Jones upheld the automatic commitment procedure of the District of Columbia, justifying the result at least in part by pointing to the standard applied to the review of the commitment: The defendant is to be released if he establishes either that he is no longer mentally ill or that he is no longer dangerous to himself or others. This standard differs from the one established by Gebarski because the latter standard looks only to dangerousness. The Field opinion itself seems to emphasize this difference when, in quoting the Jones release standard, it added emphasis to the disjunctive nature of that standard by underlining the word "or":

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> In addition, in Jones the court recognized that a committed acquittee ". . . is entitled to release when he has recovered his sanity or is no longer dangerous." 103 S. Ct. at 3051. (Emphasis added.) 118 Wis. 2d 269, 279-80.

Despite appearing to point out this disparity between the Jones and the Gebarski release standards, the Field opinion went on to review the Wisconsin reexamination procedures with apparent approval, suggesting that they were like those approved in Jones in affording the committed person a chance for prompt review of his commitment and possible release. 118 Wis.2d 269, 280.

Thus, Field is ambiguous about the continued viability of the Gebarski release standard. Despite the indirect references discussed above, the opinion did explicitly state that it was not addressing the reexamination question:

> . . . any issues concerning the constitutionality of the reexamination and release procedures under sec. 971.17(2) . . . are not raised in this case and we do not decide them.

118 Wis.2d 265, 281.

The Gebarski standard is more directly challenged by the decision in Foucha v. Louisiana, United States Supreme Court, May 18, 1992. Foucha held that Louisiana statutes similar, but not identical, to Wisconsin's, were unconstitutional because they allowed continued commitment of dangerous offenders who were no longer mentally ill. The Foucha decision is discussed in more detail in Wis JI-Criminal 600, Introductory Comment, at Section V.,C. Trial courts should carefully review the Foucha decision before using Wis JI-Criminal 661.

5. The allocation of the burden is clear: ". . . the burden of showing dangerousness is on the state." State v. Gebarski, 90 Wis.2d 754, 770, 280 N.W.2d 672 (1979).

6. This burden of proof was approved in State v. Gladney, 120 Wis.2d 486, 355 N.W.2d 547 (Ct. App. 1984).

7. The three verdict questions are those recommended by the Wisconsin Supreme Court in the first Gebarski decision, 80 Wis.2d 489, 502. The use of the questions was implicitly approved in the second Gebarski decision, 90 Wis.2d 754, 760. See Wis JI-Criminal 662 for a sample verdict form.

8. If the jury determines that release on conditions is appropriate, it is the duty of the judge to establish those conditions. The Committee recommends that the judge contact the department to assure that the conditions imposed can be fulfilled.

9. The suggested instruction assumes that the reexamination jury will be composed of six members and that agreement by five-sixths is sufficient (see § 51.20(11)(a) and (b)).

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THIS INSTRUCTION APPLIES ONLY TO REEXAMINATIONS CONDUCTED FOR PERSONS ADJUDICATED NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT FOR OFFENSES COMMITTED PRIOR TO JANUARY 1, 1991.[1]

662 VERDICTS SUBMITTED FOR REEXAMINATION UNDER § 971.17(2)

The following three forms of verdict[2] will be submitted to you for your consideration concerning the reexamination of (name of petitioner).

One reading: "We, the jury, find (name of petitioner) should be recommitted to the custody of the department at an appropriate institution."

One reading: "We, the jury, find (name of petitioner) may be safely released from (name of institution) upon such conditions as the court deems necessary."[3]

And the other reading: "We, the jury, find (name of petitioner) may be safely discharged from the custody of the department."

It is for you to determine which one of the forms of verdicts submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 662 was originally published in 1980 and republished without change in 1984, 1988, 1990, and 1992. The 1992 revision added to footnote two. Wis JI-Criminal 662 was republished without change in 2011.

1. Chapter 334, Laws of 1989, changed reexamination procedures for persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991. The right to reexamination is replaced by the right to petition for conditional release. See the discussion at Wis JI-Criminal 600, Introductory Comment. Reexamination procedures addressed by Wis JI-Criminal 660-662 continue to apply to persons committed for offenses occurring before January 1, 1991. § 971.17(8).

2. The questions in the suggested verdict are those identified by the Wisconsin Supreme Court in State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 502, 259 N.W.2d 531 (1977). The

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continued viability of the Gebarski dangerousness standard is open to question. See the discussion of Foucha v. Louisiana, United States Supreme Court, May 18, 1992, in Wis JI-Criminal 600, Introductory Comment, at V.,C., and in the comment to Wis JI-Criminal 661.

3. If the jury determines that release on conditions is appropriate, it is the duty of the judge to establish those conditions. The Committee recommends that the judge contact the department to assure that the conditions imposed can be fulfilled.

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700 LAW NOTE: THEORY OF DEFENSE INSTRUCTIONS

A request for an instruction on the "theory of defense" must be granted when: a) it relates to the legal theory of a defense as opposed to the interpretation of the evidence urged by the defense, and b) it is supported by the evidence, and c) it is not adequately covered by the other instructions in the case.

These principles were originally discussed in State v. Davidson.[1] The Davidson statement has been cited often in later cases,[2] but it has not been substantially improved upon. The Davidson court stated:

> Defendant next claims as error the failure of the trial court to give a proposed instruction, the so-called "theory of the defense" instruction. On this point it is important to distinguish between the legal theory on which prosecution or defense relies and the factual evidence adduced in support of such theory. In the case before us, the proposed "theory of defense" instruction submitted by the defense appears to be a summarization of the evidence as the defense sees it. In fact, the defendant's counsel in their brief define a "theory of defense" instruction as ". . . the defendant's theory of the case is a recitation of the facts upon which he relies and the inferences which can reasonably be drawn from these facts." This commingles an explanation as to legal theory with comments on the evidence by the trial judge. The majority of cases cited by defendant on this point are from the federal system, where comments on the evidence may be made by the trial judge. In Wisconsin, trial judges are not to thus comment on the evidence. Such comment even in the form of a statement that these are the assertions of the defense, is not allowed in Wisconsin.
>
> It is true that the legal theory of prosecution and defense is presented to juries in this state in general instructions, in the reading of the information, and in special defensive instructions such as those relating to self-defense, insanity, etc. It can be prejudicial error for a trial judge to fail to instruct on a special defense if the evidence raises that issue. This relates to the legal theory, not a factual summary. In the instant case, the legal theory of the defense was adequately covered by the instructions. The defendant entered a general plea of not guilty, putting the state to its proof. The trial judge instructed the jury on the fact of such not guilty plea having been entered, the burden of proof resting upon the state, the presumption of innocence, the necessity of the state proving each element of the crime charged, and the duty of the jury

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to acquit if they did not believe and find him guilty beyond a reasonable doubt. This was adequate coverage of the legal theory of the case of the defendant.

44 Wis.2d 177, 191-92

I. The "Legal" Theory of Defense

The right to an instruction on the theory of defense is a right to have the jury instructed on the law. Thus, the Davidson case refers to the "legal" theory of defense. Examples that clearly fit this category are the defenses recognized by the Wisconsin statutes or by case law. The former include intoxication,[3] mistake,[4] coercion,[5] necessity,[6] self-defense,[7] defense of others,[8] defense of property,[9] and other statutory privileges.[10] The latter include entrapment,[11] alibi,[12] and other privileges or defenses recognized by the common law and not inconsistent with the criminal code.[13] The requested instruction must correctly state a principle that is recognized as a defense to the crime charged. For example, a requested instruction on the defective condition of an automobile was properly refused as not stating a defense to the charge of operating under the influence.[14]

Most of the legal defenses referred to above are addressed by suggested uniform instructions. Giving the instruction on such a defense would, therefore, satisfy the right to receive an instruction on the theory of defense.[15]

The distinction the Davidson case tries to make is between a "legal theory" and the "factual evidence adduced in support of such a theory." The court held that parties are not entitled to instructions that provide a factual summary of the evidence relied on. For example, the following instructions[16] constitute factual summaries rather than statements of a legal theory:

- "The defendant's theory of defense is that while he acknowledges the fact that he did enter Sanders Collision Service and that he did not have the permission of the owner or occupant, he had no intent to steal before or at the time of entry. He has contended that he entered the building because of the weather and his sleepiness or drunkenness; that he only decided to take liquor after seeing it while he was lying down on the floor. Thus, he says that a necessary element of the crime of burglary does not exist in this case."

- "The defendant's theory of defense is that he was neither involved in the burglary nor took any movable property from Ken-Crete Products, was neither a passenger in nor the owner of the vehicle stopped by the Kenosha County sheriff's deputy, and that his mere presence near the scene of the crime, without more, was not sufficient for conviction."

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- "The defendant's theory of defense is that he did not commit the act charged and that the victim is lying."

II. The Legal Theory of Defense Must be Supported by the Evidence

Assuming that the theory of defense upon which an instruction is requested is one recognized by law, the evidence must support the instruction. This is the standard rule that applies to the giving of an instruction on any topic.[17] The simplest statement of the standard is that there must be "some evidence" on a matter before it becomes an issue on which an instruction must be given.[18] Although more complicated descriptions of the standard are possible, they are beyond the scope of this discussion.[19] The most useful test may be to ask whether there is enough evidence of a defense to generate a jury issue on its existence or nonexistence. The question is "whether a reasonable construction of the evidence will support the defendant's theory 'viewed in the most favorable light it will reasonably admit of from the standpoint of the accused.'"[20]

Though the burden of producing "some evidence" on a defense is commonly referred to as the defendant's burden, that is not literally correct.[21] The source of the evidence may be facts presented by the prosecution, facts elicited from prosecution witnesses by defense cross-examination, or evidence affirmatively presented by the defense.

III. Not Adequately Covered by Other Instructions

Even if a requested theory of defense instruction correctly states the law and is supported by the evidence, it need not be given "[i]f the instructions of the court adequately cover the law applicable to the facts."[22] Appellate courts have invoked this rule in upholding the refusal to give the following requested instructions:

- A requested instruction that the defendant's "theory of defense" is that he lacked the intent to kill was adequately explained through the general instructions given on intent.[23]

- A requested instruction that the witness did not really see the defendant at the crime scene is adequately covered by the general instruction on credibility.[24]

- "Lenarchick's legal theory of defense was simply that he had not committed the crime. The general instructions given by the court were completely adequate for that situation."[25]

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- ". . . [T]he defendant's 'theory' was simply that she did not participate in the drug deal . . . this theory was adequately explained to the jury through the instruction defining the substantive offense. . ."[26]

The Committee recommends that this line of reasoning not be applied in an overly strict manner in certain situations. Many well-recognized defenses negative a required element of the crime. For example, voluntary intoxication and mistake are defenses only when they negative the existence of a state of mind essential to the crime.[27] One could argue that a separate instruction on such matters is never required because the existence of the mental state is always covered by the instructions defining the substantive offense. Such a literal application of the rule being discussed here obviously would run counter to long-standing practice. The jury ought to be told that the law of the state recognizes that voluntary intoxication or good faith mistake may result in the nonexistence of criminal intent. The recommended practice is to relate the explanation of the defense directly to the element to which it relates.[28]

IV. Procedural Considerations

As with any other requested instruction, a proposed "theory of defense" instruction should be submitted to the trial court in writing.[29] The court may reject it if it does not meet the standards discussed here, may use it if it correctly states the law, or may modify it.

V. Conclusion

The Davidson decision offers a framework for evaluating the necessity for instructing on the theory of the defense. The cases interpreting the Davidson rule give considerable leeway in refusing a requested instruction. But the rigid application of the rule may be counterproductive in some cases because such instructions may be helpful in making the jury instructions more understandable.

One of the recommended techniques for improving the understandability of jury instructions is to make them more concrete and less abstract.[30] Emphasizing the facts that relate to a required element is one way to help the jury make the connection between an abstract definition and the case to be decided. Referring to facts can also help to focus the jury's attention on the important issues in the case. For example, if the statutory definition of a crime is complicated and the defense is one of alibi, the jury will be greatly aided by an instruction that helps focus their attention on the alibi issue, rather than on parts of a complicated definition that are not in dispute.[31]

COMMENT

Wis JI-Criminal 700 was approved by the Committee in August 1990.

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1. State v. Davidson, 44 Wis.2d 177, 191-92, 170 N.W.2d 755 (1969).

2. See the cases cited in notes 22-26, below.

3. Section 939.42 and Wis JI-Criminal 765.

4. Section 939.43 and Wis JI-Criminal 770.

5. Section 939.46 and Wis JI-Criminal 790.

6. Section 939.47 and Wis JI-Criminal 800-820.

7. Section 939.48 and Wis JI-Criminal 800-820.

8. Section 939.48(4) and Wis JI-Criminal 830 and 835.

9. Section 939.49 and Wis JI-Criminal 855 and 860.

10. The general definitions of defenses which are privileges are found in § 939.45. In addition to the specific privileges listed in subsections (1) through (5), subsection (6) provides for other, unspecified, privileges: "When for any other reason the actor's conduct is privileged by the statutory or common law of this state." For an example, see Wis JI-Criminal 880 and 885 relating to the police officer's privilege to use force in making an arrest.

11. The common law development of the entrapment defense is discussed in the Comment to Wis JI-Criminal 780.

12. See Wis JI-Criminal 775.

13. See § 939.45(6), discussed in note 10, supra, and § 939.10, which provides in part: "The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." An example of a common-law defense recognized under these principles is the "legal justification" defense to speeding. See State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982), summarized in the Comment to Wis JI-Criminal 2676.

14. State v. Gaudesi, 112 Wis.2d 213, 332 N.W.2d 302 (Ct. App. 1983).

15. See the discussion at III, below.

16. The examples are based on instructions discussed in unpublished decisions of the Wisconsin Court of Appeals. The Committee believes they illustrate requested instructions calling for discussion of the evidence and, therefore, may properly be refused.

17. See, e.g., Turner v. State, 64 Wis.2d 45, 51, 218 N.W.2d 502 (1974).

18. For example, ". . . the defendant must point to some evidence of the degree of intoxication which constitutes a defense." State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100 (1984), emphasis added.

19. A more complete statement that attempts to relate the evidentiary standard to the requirement that the state to disprove defenses provides:

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> [I]f it appears from the evidence, either that produced by the state or by the defense, that a jury, under a reasonable view of the evidence, could conclude that the state has not sustained its burden of disproving [the defense].

State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

It may be questioned whether the "some evidence" standard can be elaborated upon in a helpful way. The Model Penal Code uses the phrase "[when] there is evidence supporting the defense." The commentary indicates that the "draft does not attempt to state how strong the evidence must be to satisfy the test 'that there is evidence' supporting the defense. . . . It should suffice to put the prosecution to its proof beyond a reasonable doubt that the defendant shows enough to justify such doubt upon the issue." Model Penal Code § 1.13 (Tent. Draft No. 4, 1955), Commentary at 110. A commentator has concluded that "the commentary on what will satisfy the burden of producing evidence is singularly unhelpful," but points out that "in the context of particular issues, and recurring fact situations, however, courts have developed a common law of sufficiency for this purpose." Underwood, "Burdens of Persuasion in Criminal Cases," 86 Yale L. J. 1299, 1335 (1983).

20. State v. Mendoza, 80 Wis.2d 122, 153, 258 N.W.2d 260 (1977), citing Ross v. State, 61 Wis.2d 160, 172, 211 N.W.2d 827 (1973). Both cases addressed the issue in the context of the sufficiency of the evidence to require submitting an instruction on a lesser included offense.

21. "In some instances the prosecution's case may contain sufficient evidence in support of the defendant's position to generate a jury issue." Patterson v. New York, 432 U.S. 197, 231 n. 17 (1977) (Powell, J., dissenting).

22. State v. Pruitt, 95 Wis.2d 69, 80, 289 N.W.2d 343 (Ct. App. 1980).

23. State v. Pruitt, supra.

24. Johnson v. State, 75 Wis.2d 344, 307, 249 N.W.2d 593 (1977).

25. State v. Lenarchick, 74 Wis.2d 425, 456, 247 N.W.2d 80 (1976).

26. State v. Roubik, 137 Wis.2d 301, 309, 404 N.W.2d 105 (Ct. App. 1987).

27. Sections 939.42(2), 939.43(1).

28. See Wis JI-Criminal 765.

29. Section 972.10(5).

30. See, for example, Elwork, Sales & Alfini, Making Jury Instructions Understandable (Michie 1982); Charrow & Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia Law Review 1306 (1979); and Strawn & Buchanan, "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976).

31. Care must be taken to assure that adequate instruction is given on each element of the crime. This discussion assumes that the defense is requesting the attention-focussing instruction.

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705 LAW NOTE: JURY NULLIFICATION

This law note discusses "jury nullification," a term generally understood as referring to a jury's returning of a not guilty verdict even though the evidence is sufficient to establish all the elements of a crime beyond a reasonable doubt. State v. Bjerkaas, 163 Wis.2d 549, 472 N.W.2d 615 (Ct. App. 1991), is the first published appellate decision in Wisconsin to consider directly several issues relating to the jury nullification issue. Bjerkaas and related cases are discussed below.

I. The Jury Has the Power But Not the Right to "Nullify"

A. The Power to Nullify

A jury has the power to nullify, that is, to return a not guilty verdict even though the evidence is sufficient to prove all elements beyond a reasonable doubt. This power flows from the interaction of practical concerns and legal rules:

1) the jury cannot be compelled to act in a particular way or reach a particular result;

2) once the jury retires, no one knows what goes on;

3) only general verdicts are used in criminal cases; and

4) there can be no appeal from a not guilty verdict.

Thus, when a jury returns a general, not guilty, verdict, no one can tell what the basis for that verdict was. The verdict may reflect legitimate disagreement about whether the elements of the crime were established; it may reflect honest doubt about whether the burden of proof was met; it may reflect a mistake about the facts; or it may reflect a conclusion reached in defiance of the proof. But unless individual jurors make posttrial statements to explain their verdict, the basis for the verdict will remain unknown.

Even if it becomes known that a jury engaged in nullification, no remedial action can be taken.[1] It is a fundamental principle of double jeopardy that the state cannot appeal from a not guilty verdict.[2] The principal applies regardless of the reason why the jury reached the not guilty conclusion.

Wisconsin courts have recognized the jury's power of nullification.[3] But they have distinguished between the "power to nullify the objectively correct application of the law and the right to do so." State v. Bjerkaas, 163 Wis.2d 949, 960, emphasis in original.

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B. The Jury Does Not Have the Right to Nullify

One argument in favor of an expansive view of jury nullification is that the jury has a historical role as a check on prosecutors, judges, and legislatures.[4] Some go so far as to argue that for conduct to be criminal, it must be "blameworthy" in addition to meeting the statutory requirements, and that the "blameworthiness" is only for the jury to assess.[5] In support, proponents refer to situations where courageous juries have refused to convict "technically" guilty protesters like William Penn and John Peter Zenger.[6] The claim is that the nullification power is of the essence of the right to jury trial and may not be limited in any way without violating that constitutional right.

In 1895, the United States Supreme Court rejected the federal constitutional right argument. Sparf v. United States, 156 U.S. 51 (1895). More recently, the court has stated that "a defendant has no entitlement to the luck of a lawless decisionmaker, even if the decision cannot be reviewed." Strickland v. Washington, 446 U.S. 668, 695 (1984) (in holding that a harmless error analysis may be applied to claims of ineffective assistance of counsel). Federal and state courts have been uniform in rejecting the constitutional right argument. An exception exists in three states — Georgia, Indiana, and Maryland — where the state constitution expressly provides that the jurors are the judges of the law and the facts.[7] (Note that Article I, Section 3, of the Wisconsin Constitution provides that in criminal prosecutions for libel "the jury shall have the right to determine the law and the fact.")

The Bjerkaas court followed this trend: . . . that "juries have the power to do what they want . . . does not translate to have a jury decide a case contrary to law or fact. . . ." 163 Wis.2d 949, 960.

II. Defense Argument Relating to Jury Nullification is Properly Limited

The defendant in Bjerkaas argued that it was error for the trial court to refuse defense counsel permission to argue nullification by urging the jury to acquit regardless of the law. The court of appeals held that the trial court did not abuse its discretion in refusing to allow this line of argument. That "juries have the power to do what they want . . . does not translate to a right to have a jury decide a case contrary to law or fact, much less a right . . . to an argument urging them to nullify applicable laws." 163 Wis.2d 949, 960. The defense counsel in Bjerkaas was allowed to "talk in terms of fairness in general terms" but not to go further and argue that the jury "should discard the instructions and the law and find her not guilty because it seems fair." Ibid.

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III. Jury Instructions For or Against Jury Nullification

A. A Jury Instruction on Jury Nullification May Properly be Refused

The argument in favor of a jury instruction on jury nullification is based in part on the rationale that since the jury has the practical power to engage in nullification, the jury ought to be told of that power. The court in Bjerkaas also rejected this assertion: that "juries have the power to do what they want . . . does not translate to a right to have a jury decide a case contrary to law or fact, much less a right . . . to an instruction telling jurors they may do so." 163 Wis.2d 949, 960. In accord is State v. Olexa, which held that an instruction telling jurors they "could ignore [a] statute if they felt it was unfair" could properly be denied. 136 Wis.2d 475, 485, 402 N.W.2d 733 (Ct. App. 1987).[8]

An instruction on jury nullification would contradict other general instructions jurors receive which tell them that they are to reach a verdict based only on applying the law given in the instructions to the facts properly proved by the evidence. (Wis JI-Criminal 100.) Jurors are told not to be swayed by sympathy, prejudice, or passion. (Wis JI-Criminal 460.) Standard questions asked of jurors during voir dire typically require a commitment that the juror can reach a verdict fairly and impartially, based on the law given in the instructions and the evidence presented. See, for example, SM-20, Suggested Jury Voir Dire, and Wisconsin Judicial Benchbook, CR-17 (1987).

B. Instructing that Nullification is Not Proper

Antijury nullification instructions have been approved. It has been held to be proper to admonish jurors that they are not at liberty to disregard the law no matter what their individual views as to its wisdom. Williams v. State, 192 Wis. 347, 352, 212 N.W.2d 631 (1927). In Schmidt v. State, 159 Wis. 15, 149 N.W. 388 (1914), the following instruction was approved:

> The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case.

Despite these two cases, the Committee recommends that no instruction, pro or con, be given relating to jury nullification. The instructions for substantive criminal offenses do, in a sense, acknowledge the power of jury nullification. The concluding paragraphs always state that if the jury is satisfied that the facts necessary to constitute the crime are proved, they should find the defendant guilty but that if they are not so satisfied, they must find the defendant not guilty.[9] The Committee believes this accurately reflects the law on jury nullification as discussed in Bjerkaas: it acknowledges that the power exists but declines to offer specific advice on its exercise.

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COMMENT

This law note was approved by the Committee in August 1991.

1. The general rule is that impeachment of a verdict by receiving evidence relating to the jury's deliberations is not permitted. See § 906.06(2); after Hour Welding v. Lanceil Management Co., 108 Wis.2d 734, 324 N.W.2d 868 (1982); and State v. Poh, 116 Wis.2d 510, 343 N.W.2d 108 (1984).

2. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed . . . without putting [a defendant] twice in jeopardy. . . ." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), cited in State v. Turley, 128 Wis.2d 39, 48, 381 N.W.2d 309 (1986).

"To permit an appeal from the acquittal itself would violate the fundamental principles upon which the constitutional prohibition of double jeopardy is grounded. . . ." State v. Evjue, 254 Wis. 581, 591 37 N.W.2d 50 (1949). [The Evjue case held that the same rule applies when the acquittal is by the trial court in a nonjury case. It, in effect, recognized a power of nullification in a trial judge acting as the finder of fact.]

3. State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987); Evjue v. State, note 2 supra.

4. The historical background is discussed in Scheflin and Van Dyke, "Jury Nullification: The Contours of a Controversy," 43 Law and Contemporary Problems 51 (Autumn 1980). Also see Scheflin, "Jury Nullification: The Right To Say No," 45 So. Cal. L. Rev. 168 (1972).

5. This view sees jury nullification as a technique for counteracting the trend toward legislature's adopting over-inclusive criminal legislation: "American criminal procedure responds to this legislative defect by giving both the prosecutor and the jury the power to decriminalize a particular defendant's conduct that is not sufficiently 'blameworthy' or 'dangerous'. . . ." Arenella, "Rethinking The Functions of Criminal Procedure," 72 Georgetown Law Journal 185, 216 (1983).

6. See note 4, supra.

7. For example, article 1, § 19, of the Indiana Constitution says that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts." Cited in Scheflin and Van Dyke, note 4, supra, at 79.

8. For federal cases holding that a specific nullification instruction should not be given, see, for example, United States v. Berrigan, 417 F.2d 1002 (4th Cir. 1969); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972), and United States v. Anderson, 716 F.2d 446, 449 (7th Cir. 1983).

9. "This distinction between 'must' and 'should' in the criminal law is long-standing in American jurisprudence, as it is in Wisconsin. Indeed, there is authority that this distinction is implicit in the Constitution's Sixth Amendment right to a trial by jury." State v. Thomas, 161 Wis.2d 616, 631, 468 N.W.2d 729 (Ct. App. 1991).

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710 LAW NOTE: RIGHT TO RECAPTURE

The Committee concluded that a pattern instruction for the so-called right to recapture, claim of right, or self-help defense should not be drafted because such an instruction may relate to more than one element of a crime and should be closely tailored to the facts of the case. The defense, referred to here as "right to recapture," is best viewed as a general reference to factual situations where an element of the crime may not be present. Thus, it is not a true "defense" in the sense that facts are established which excuse or justify what would otherwise be criminal conduct. Rather, the right to recapture is what is sometimes referred to as a "negative defense" (meaning that it negates an element of the crime) or a "failure of proof" defense (meaning that the state fails to prove a fact necessary to constitute the crime.) Because the elements of the crime are already covered by the jury instructions for that crime, some believe that no additional instruction is required for a defense that attacks an element. Others believe that relating the defense to a specific element is helpful to the jury, especially where the matter has been emphasized during the trial. The Committee concluded that the matter is best resolved by the trial judge on a case-by-case basis.

Two elements of typical property crimes may be affected by the claim of a right to recapture. First, theft, robbery, and burglary all apply to taking "the property of another." If a person recaptures his or her own property, this element is not established. A simple statement to this effect would be the most that is needed by way of additional jury instruction if this aspect of the right to recapture is involved in a case.

The second, and more common, situation involves the "intent to steal" element. A person who intends to take back what is his does not intend to take and carry away property of another, thus lacking the intent to steal. In this situation, an additional jury instruction could simply apply the standard mistake instruction, Wis JI-Criminal 770, to the mental element of intent to steal.

This approach is consistent with the Comment to § 343.27, Robbery, in the 1953 Draft of the Criminal Code which states:

> . . . If the actor mistakenly but honestly believes that he is recovering his own property, he is guilty of neither stealing nor robbery. For example, the actor thinks the other person has cheated at gambling, so he forcibly retakes the money he has lost. If the actor believes the property to be his own, he is not guilty of robbery though he may be guilty of battery.

1953 Judiciary Committee Report on the Criminal Code, Vol. V, p. 124

This approach is also believed to be consistent with Wisconsin case law. The leading case is Edwards v. State, 49 Wis.2d 105, 181 N.W.2d 383 (1970), where the

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defendant claimed he was not guilty of robbery because he was just collecting money the victim owed him. The trial court instructed the jury that as a matter of law an indebtedness is not a defense to a charge of attempted robbery. The Edwards decision reviewed the majority and minority views on this issue and did not adopt either one. Instead, the court announced the "same property" rule: the defense is available if the "accused can trace his ownership to specific coins and bills in the possession of the debtor." 49 Wis.2d 105, 113. The rule has been cited with approval in two more recent cases: Austin v. State, 86 Wis.2d 213, 271 N.W.2d 668 (1978), and State v Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992). Both Austin and Pettit involved attempts to recover money; convictions were affirmed in each case because the evidence was sufficient to show that the money obtained was not the same money that originally belonged to the defendant.

The "same money" rule is referred to in these cases in a way that may seem to be inconsistent with the mistake approach recommended here. Under the mistake approach, it would be a defense (or, more precisely, the state would be unable to prove intent to steal) if the defendant subjectively intended to take only the property that belonged to him. The property would not, in fact, have to be the same; an actual belief on the part of the defendant would be enough to negate the intent to steal.

The Committee believes the mistake approach is consistent with the Edwards decision. Edwards reviewed the so-called majority and minority positions and rejected both. The majority position was described as follows:

> . . . a charge of robbery will fail where the money or property was taken at gunpoint with an intent to collect or secure payment of the debt, or as the rule is sometimes stated, if the taker in good faith believes he owns or is entitled to the possession of the property, 77 C.J.S., Robbery, p. 464, sec. 22. This rule is based on the theory than an animus furandi (intent to steal) does not exist when a person takes property under the belief he has a bona fide claim to it. It is this belief, whether valid or not, that the majority of jurisdictions hold is inconsistent with an intent to steal.

49 Wis.2d 105, 111-112.

The court rejected this rule, saying it could not:

> . . . accept the view of the majority cases which see no distinction between the reclaiming of one's own property by force and the taking of money by force from a debtor to repay a debt which is presently owing. We think the intent to steal is present when one at gunpoint or by force secures

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> specific money which does not belong to him in order to apply it by such self-help to a debt owed to him.

49 Wis.2d 105, 113

Edwards described the minority position as one held by a few states which simply deny the defense on grounds of public policy. The court also rejected this position:

> . . . the intent must be to steal. If a person seeks to repossess himself of specific property which he owns and to which he has the present right of possession and the means he uses involves a gun or force, he might not have the intention to steal.

The Committee concluded that the mistake approach discussed here is consistent with the general principles of Wisconsin law as applied to mental states and mistake. Further, it is consistent with Edwards and the cases which follow it if Edwards can fairly be read to apply only to collecting-a-debt cases where the defendant claims that he believed it was lawful to reclaim an amount of money that would satisfy the debt. This could be characterized as a mistake of law, which is not a defense. However, even in a collecting-a-debt case, if the defendant intends to take back his own property, he lacks the intent to steal, whether or not the property he takes back is really his.

The final paragraph in Edwards appears to be consistent with this analysis:

> Neither Higgins' nor Edwards' view of the facts suggests an attempt to get specific money, the ownership title to which was in Edwards, and thus the crime of attempted robbery was committed. The trial court was correct in instructing the jury that the existence of a debt was not a defense to the charge of attempted armed robbery.

49 Wis.2d 105, 114

To summarize:

If the defendant's claim is that he thought it was lawful to take property from the victim equal in value to that which the victim owed the defendant, there is no defense. That is, all the elements of the crime can be established.

If the defendant claims that he intended to take back the specific property (which in the case of a money debt must be the same bills) that the victim had wrongfully appropriated from the defendant, that would be enough, if believed, to prevent the proof of intent to steal.

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In crafting an instruction, care should be taken to avoid two problems discussed in the Pettit case. Pettit involved two specific challenges to the instruction given by the trial judge, which was modelled after language in the Edwards decision. In each instance, the court of appeals found the instruction given was not error but suggested that the alleged defects be avoided. The instruction given in Pettit read:

> Evidence has been received in this trial that one or more of the defendants believed he had a bona fide claim to money possessed by Larry Morrison. The use of self-help by force to enforce a bona fide claim for money does not necessarily negate an intent to steal. A person may have intent to steal when he takes money from another's possession against the possessor's consent even though he intends to apply the money to what he believes is a bona fide claim.
>
> Unless an accused can trace his ownership to specific coins and bills in the possession of another, the other is the owner of the money in his pocket.

First, the defendants claimed that the instruction did not focus the jury's attention on the need to prove that intent to steal existed at the time of entry for purposes of the burglary charge. The court acknowledged that the instruction given "might suggest that an alleged burglar's intent is measured at the time of the later theft – not at the time of the entry . . . [T]his portion of the instruction should have been more focused as to when the requisite intent must exist in a burglary situation." 171 Wis.2d 627, 637.

Second, the defendants claimed that the instruction shifted the burden to them to prove that they did not have the intent to steal, referring particularly to the last sentence of the instruction. The court of appeals rejected this argument, concluding that the instruction placed a burden on the defendants only to produce evidence that the bills repossessed "were the identical funds previously stolen by Morrison." The burden to prove intent to steal remained on the state. Again, the court said that if this could be considered error, it was isolated and cured by the rest of the instructions. The court suggested that an instruction on this topic "ideally should be accompanied by proximate language which stresses again that the state retains the burden of proof on the element of intent." 171 Wis.2d 627, 642, n. 7.

Pettit illustrates the potential confusion that can develop in a "right to recapture" case. Under the Pettit facts, the Committee believes the following analysis should apply. If Pettit entered Morrison's trailer with the intent to recover money Morrison stole from Pettit, Pettit is not guilty of burglary because he did not enter with the intent to steal. He lacked intent to steal because he intended to take property belonging to him, not "property of another." Pettit would not be guilty of armed robbery for the same reason: If he believed he was taking back his own property, he did not intend to steal. Further, if he really did take only money Morrison had stolen from him, he would not be guilty for the additional reason that he did not take "property of another." It is with respect

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to the latter point, that the "same property rule" requires that bills must be exactly the same as those taken from Pettit.

COMMENT

Wis JI-Criminal 710 was approved by the Committee in October 1993.

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755 INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(1)

[RENUMBERED WIS JI-CRIMINAL 755A]

COMMENT

This instruction was originally published as Wis JI-Criminal 755 in 1962 and revised in 1984, 1994, and 2005. This instruction was renumbered Wis JI-Criminal 755A in February 2015.

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755A INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(1)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[1]

Involuntary Intoxication

The defense of involuntary intoxication is also an issue in this case.

(An intoxicated) (A drugged) condition is a defense to criminal liability if it is involuntarily produced and makes the person unable to tell whether his acts are right or wrong at the time the acts are committed.

(Intoxication) (A drugged condition) is involuntary when it is brought about by duress, deceit, or mistake.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,[3] and that at the time of the alleged offense the defendant was not in an involuntary (intoxicated) (drugged) condition which made him unable to distinguish between right and wrong, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 755 in 1962 and revised in 1984, 1994, and 2005. This revision renumbered the instruction as Wis JI-Criminal 755A and was approved by the Committee in February 2015.

Section 939.42, the statute that formerly codified both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014].

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As amended by Act 307, § 939.42 reads as follows:

939.42 Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

(1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.

(2) Negatives the existence of a state of mind essential to the crime.

With the revision of § 939.42 by Act 307, the Committee decided to split former Wis JI-Criminal 755 into two versions: Wis JI-Criminal 755A for cases under sub. (1) and Wis JI-Criminal 755B for cases under sub. (2).

The 1953 Legislative Council Report on the Criminal Code commented on this defense as follows:

> In practice the defense provided by subsection (1) is seldom raised, for it is necessary to show that the intoxicated or drugged condition both (a) was involuntarily produced and (b) rendered the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act was committed. In order to show that the intoxication was involuntary, it generally is necessary to show that it was induced by force or fraud on the part of a third person, or that it resulted from a mistake on the part of the actor as to the intoxicating nature of the thing he consumed. If it can be established that the intoxicated or drugged condition was involuntary, it still is necessary to show that it was of such a degree as to render the actor incapable of distinguishing between right and wrong. Thus, in regard to the effect which involuntary intoxication must produce in order to be considered a defense, the same test applies as in the case of mental disease or deficiency as a defense. The fact that the temporary inability to distinguish between right and wrong dealt with under subsection (1) intoxication does not mean that a mental disease such as delirium tremens is not a defense when produced by voluntary intoxication, but it is a defense under the section on insanity and feeblemindedness rather than under this section.

The primary issue discussed by Wisconsin appellate courts since the 1953 Report has been the connection between involuntary intoxication and addiction to drugs or alcohol. See note 2, below.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Involuntary intoxication can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on involuntary intoxication with that for the underlying crime by inserting Wis JI-Criminal 755 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

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2. Addiction to drugs or alcohol is not a basis for "involuntariness" under the statute. Loveday v. State, 74 Wis.2d 503, 247 N.W.2d 116 (1976). Language in previous cases that may be inconsistent with this holding was withdrawn. (See Roberts v. State, 41 Wis.2d 537, 543, 545-46, 164 N.W.2d 525, 527, and 529 (1969); Staples v. State, 74 Wis.2d 13, 19-20, 245 N.W.2d 679 (1976).

In State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (Ct. App. 1999), the court held that the involuntary intoxication defense can apply where intoxication results from the effects of prescription drugs. The court declined to limit the defense to situations when the defendant did not know about the intoxicating effect of the medication. "Even if forewarned of the intoxicating effect of a prescription drug, a person should have recourse to the defense if the drug renders him or her unable to distinguish between right and wrong." 230 Wis.2d 32, 41. However, "this does not include cases where a patient knowingly takes more than the prescribed dosage, or mixes a prescription drug with alcohol or other controlled substance. Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug's side effects." 230 Wis.2d 32, 42.

3. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as involuntary intoxication, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of involuntary intoxication would result in the following:

> If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant was not in an involuntary intoxicated condition which made him unable to distinguish between right and wrong, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

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755B INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(2)

ADD THE FOLLOWING TO THE INSTRUCTION ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DEFINITION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF INTOXICATION RELATES.

Involuntary Intoxication

Evidence has been presented which, if believed by you, tends to show that the defendant was involuntarily (intoxicated) (drugged) at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state)[1] required for this offense.

(An intoxicated) (A drugged) condition may be a defense to criminal liability if it is involuntarily produced. (An intoxicated) (A drugged) condition is involuntary when it is brought about by duress, deceit, or mistake.[2]

If the defendant was so (intoxicated) (drugged) that the defendant did not (describe mental state), you must find the defendant not guilty of (charged crime).

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

This instruction was approved by the Committee in March 2015.

Wis JI-Criminal 755 originally addressed only the version of the involuntary intoxication defense now specified in § 939.42(1). With the revision of § 939.42 by Act 307, the Committee decided to split former Wis JI-Criminal 755 into two versions: Wis JI-Criminal 755A for cases under sub. (1) and Wis JI-Criminal 755B for cases under sub. (2).

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Section 939.42, the statute that formerly codified both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014].

As amended by Act 307, § 939.42 reads as follows:

939.42 Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

(1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed..
(2) Negatives the existence of a state of mind essential to the crime.

The 1953 Legislative Council Report on the Criminal Code commented on this defense as follows:

In practice the defense provided by subsection (1) is seldom raised, for it is necessary to show that the intoxicated or drugged condition both (a) was involuntarily produced and (b) rendered the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act was committed. In order to show that the intoxication was involuntary, it generally is necessary to show that it was induced by force or fraud on the part of a third person, or that it resulted from a mistake on the part of the actor as to the intoxicating nature of the thing he consumed. If it can be established that the intoxicated or drugged condition was involuntary, it still is necessary to show that it was of such a degree as to render the actor incapable of distinguishing between right and wrong. Thus, in regard to the effect which involuntary intoxication must produce in order to be considered a defense, the same test applies as in the case of mental disease or deficiency as a defense. The fact that the temporary inability to distinguish between right and wrong dealt with under subsection (1) intoxication does not mean that a mental disease such as delirium tremens is not a defense when produced by voluntary intoxication, but it is a defense under the section on insanity and feeblemindedness rather than under this section.

The primary issue discussed by Wisconsin appellate courts since the 1953 Report has been the connection between involuntary intoxication and addiction to drugs or alcohol. See note 2, below.

1. Here insert either a general description of the required mental state (e.g., "knowledge that the property belonged to another") or a more specific one, tailored to the facts of the case (e.g., "knowledge that the wallet belonged to John Jones").

In a theft case, the instruction would read as follows:

Evidence has been received which, if believed by you, tends to show that the defendant was involuntarily (intoxicated) (drugged) at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with knowledge that the property belonged to another required for this offense. If the defendant was so (intoxicated) (drugged) that he did not know the property belonged to another person, you must find him not guilty of theft. Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant knew the property belonged to John Jones.

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Involuntary intoxication that tends to negate a mental element calls for the same approach to integrating the defense with the elements of the crime as that used for voluntary intoxication under former § 939.42(2). See the note following the Comment to Wis JI-Criminal 765 discussing the issue.

2. Addiction to drugs or alcohol is not a basis for "involuntariness" under the statute. Loveday v. State, 74 Wis.2d 503, 247 N.W.2d 116 (1976). Language in previous cases that may be inconsistent with this holding was withdrawn. (See Roberts v. State, 41 Wis.2d 537, 543, 545-46, 164 N.W.2d 525, 527, and 529 (1969); Staples v. State, 74 Wis.2d 13, 19-20, 245 N.W.2d 679 (1976).

In State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (Ct. App. 1999), the court held that the involuntary intoxication defense can apply where intoxication results from the effects of prescription drugs. The court declined to limit the defense to situations when the defendant did not know about the intoxicating effect of the medication. "Even if forewarned of the intoxicating effect of a prescription drug, a person should have recourse to the defense if the drug renders him or her unable to distinguish between right and wrong." 230 Wis.2d 32, 41. However, "this does not include cases where a patient knowingly takes more than the prescribed dosage, or mixes a prescription drug with alcohol or other controlled substance. Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug's side effects." 230 Wis.2d 32, 42.

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765 VOLUNTARY INTOXICATION[1] — § 939.42(2)

INSTRUCTION WITHDRAWN
FOR OFFENSES OCCURRING AFTER APRIL 18, 2014,
BECAUSE THE STATUTE TO WHICH IT PERTAINED
WAS REPEALED BY 2013 WISCONSIN ACT 307

ADD THE FOLLOWING TO THE INSTRUCTION[2] ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DEFINITION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF INTOXICATION RELATES.

Intoxication

Evidence has been presented which, if believed by you, tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state)[3] required for this offense.

If the defendant was so intoxicated that the defendant did not (describe mental state), you must find the defendant not guilty of (charged crime).

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

Wis JI-Criminal 765 was originally published in 1962 and revised in 1984, 1995, 1999, 2004, and 2010. Its withdrawal for offenses occurring after the effective date of 2013 Wisconsin Act 307 was approved by the Committee in March 2015.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication.

The Committee concluded that the text of Wis JI-Criminal 765 should be retained for use in cases involving crimes occurring before April 18, 2014 – the effective date of Act 307.

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Questions remain whether evidence relevant to the non-existence of the mental element of a crime may be categorically excluded by the legislative repeal of a statute recognizing a defense like voluntary intoxication.

As amended by Act 307, § 939.42 reads as follows:

> **939.42 Intoxication**. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:
>
> (1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed..
> (2) Negatives the existence of a state of mind essential to the crime.

Act 307 also repealed former sub. (3) of § 939.24, which read as follows:

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable substantial risk of death or great bodily harm to another human being.

The 1995 revision of this instruction responded to the decision in State v. Foster, 191 Wis.2d 14, 528 N.W.2d 22 (Ct. App. 1995). In Foster, the trial court changed the then-current version of Wis JI-Criminal 765 from "you must consider the evidence that he was intoxicated" to "you may consider . . ." The defendant claimed this was error. The court of appeals rejected that claim but held that neither the standard instruction nor the trial court's modification was a correct statement of the law:

> We conclude that a correct statement of the law should be conveyed by instructing a jury that it 'must consider the evidence regarding whether the defendant was intoxicated at the time of the alleged offense.'

191 Wis.2d 14, 28.

The court agreed with the state's contention that the standard instruction advised a jury "not merely to consider evidence, but rather, to consider evidence in a way that favors the intoxication defense." But the trial court's modification to use "may" was erroneous because a "jury could interpret this to mean that it need not consider that evidence at all." 191 Wis.2d 14, 28. Thus, the court of appeals read the phrase "you must consider evidence that he was intoxicated" as an improper suggestion that the defendant really was intoxicated.

The Committee determined that the concerns discussed in Foster could best be addressed by changing the introductory section of the instruction to read:

> Evidence has been presented which, if believed by you, tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense. . . .

This reaffirms that it is not mere intoxication that may constitute a defense; intoxication must negate the mental state required for the crime.

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1. This instruction is for the defense formerly recognized by § 939.42(2), 2011-12 Wis. Stats., which provided that an "intoxicated or drugged condition" is a defense if it "[n]egatives the existence of a state of mind essential to the crime." The state was revised by 2013 Wisconsin Act 307 to apply only to involuntary intoxication.

2. The Committee recommends that the instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the required mental state is defined. The Committee has concluded that this is the best way to instruct on defensive matters that are inconsistent with elements of a crime.

3. Here insert either a general description of the required mental state (e.g., "knowledge that the property belonged to another") or a more specific one, tailored to the facts of the case (e.g., "knowledge that the wallet belonged to John Jones").

In a theft case, the instruction would read as follows:

> Evidence has been received which, if believed by you, tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with knowledge that the property belonged to another required for this offense. If the defendant was so intoxicated that he did not know the property belonged to another person, you must find him not guilty of theft. Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant knew the property belonged to John Jones.

Combining the intoxication instruction with the instruction on the crime

This instruction is substantially briefer than the pre-1984 versions of Wis JI-Criminal 765. It differs in that it does not offer extensive explanation of what intoxication is or describe what effects intoxication must have in order to be a "defense." Further, it does not explicitly require the state to prove that the defendant was not intoxicated in order to support a finding of guilty.

The reasons for recommending this brief version are based on those articulated by Justice Callow in his dissent in State v. Schulz, 102 Wis.2d 423, 302 N.W.2d 151 (1981). He argued that where a recognized "defense" negates an element of the crime, it is unnecessary to specifically advise the jury that the state must "disprove" the existence of that defense:

> It is elementary that to prove a thing exists one must in effect disprove its nonexistence. Thus when a jury is instructed that the state must prove intent beyond a reasonable doubt, it means there must be no reasonable doubt arising from the defendant's intoxication or any other intent-negating factor.
>
> . . . [w]here the issue is merely the negative or nonexistence of an element of the crime, as it is with intoxication, to first instruct on the state's burden with respect to the elements of the crime and then to instruct on the state's burden as to the nonexistence of an alcohol or drug induced negation of these elements is not only redundant but also, I believe, impermissibly intrusive into the discretion of the state to prosecute its case.

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> . . . . If a trial judge . . . decides an intoxication instruction is warranted, the jury need only be advised that in considering whether the defendant possessed the requisite intent to commit the crime, although intoxication alone does not relieve one of criminal responsibility, the fact that the defendant may have been intoxicated should be taken into account.

102 Wis.2d 423, 442-43.

The Committee concluded that the Callow suggestion should be pursued. The state's burden of proving all required elements does not change. Where certain evidence points to a reason why a required element might not be present (e.g., too intoxicated to intend to steal), nothing is to be gained by extensively defining that reason and requiring the state to prove the reason's absence. Rather, that duty is inevitably a part of proving the existence of the element with which the reason is inconsistent. To elaborate on the evidence relating to a particular reason why an element is not present is to increase the possibility for jury confusion and distraction. Rather than focussing on the central issue — did the defendant intend to steal — it is likely that the jury will be concerned with a tangential issue — how drunk was the defendant — which is important only to the extent that it has some effect on the existence of the central issue.

Thus, in the Committee's judgment, the briefer version accomplishes what it ought to accomplish. In a case where evidence has been received on the defendant's intoxicated condition, Wis JI-Criminal 765 puts that evidence into proper perspective by telling the jury that it should consider the evidence when determining whether the defendant had the mental state required for the crime charged. But the instruction does not give the evidence any more or any less emphasis than that, because evidence is only relevant to the extent that it tends to make more or less probable a fact of consequence to the determination of the action — the defendant's mental state. This approach has the additional advantage of avoiding long definitions of the "defense" that risk being interpreted by the jury as imposing a burden of persuasion on the defendant. See, for example, State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981). Compare Barrerra v. State, 109 Wis.2d 324, 325 N.W.2d 722 (1982).

Note that the Schulz case involved a modification of the then-standard intoxication instruction to include language stating that "the defendant must establish" that he was "utterly incapable" of forming the intent required. The court held that this was error, as it created the risk that the jury would understand the instruction as shifting the burden of persuasion to the defendant. [The source of the "utterly incapable" language is State v. Guiden, 46 Wis.2d 328, 174 N.W.2d 488 (1970).] Although three later cases distinguished similar instruction and found no error, the Committee recommends against the use of the "Guiden" language. [See State v. Reynosa, 108 Wis.2d 499, 322 N.W.2d 504 (Ct. App. 1982); State v. Hedstrom, 108 Wis.2d 532, 322 N.W.2d 513 (Ct. App. 1982); State v. Barrerra, 109 Wis.2d 324, 325 N.W.2d 722 (1982).]

Intoxication and crimes of recklessness

The voluntary intoxication instruction is appropriate when supported by the evidence in any case where the crime has a mental state with which intoxication may be inconsistent. An exception is provided for crimes involving recklessness. Although "criminal recklessness" is defined to include "awareness of the risk" — a mental element that intoxication arguably might negate — § 939.24(3) provides that "a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being." This reaches the same result as prior law. See

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Ameen v. State, 51 Wis.2d 175, 174 N.W.2d 488 (1971), holding that intoxication was not a defense to second degree murder under the pre-1989 homicide statutes.

The amount of evidence necessary to support an instruction on intoxication — the "burden of production"

It is difficult to describe precisely the extent and nature of evidence that is necessary to entitle the defendant to an instruction on voluntary intoxication. The Wisconsin Supreme Court has identified the following standard: An intoxication instruction is required when, "viewing the evidence in the light most favorable to the defendant, a jury could reasonably have found that he was so intoxicated that he lacked the intent to kill." Larson v. State, 86 Wis.2d 187, 195, 271 N.W.2d 647 (1978). The court has recently emphasized that what is required is evidence that the defendant was intoxicated to an extent that meets the legal standard. That is, there must be evidence that the defendant was intoxicated to an extensive degree; it is not sufficient to have a substantial amount of evidence of a lesser degree of intoxication.

> . . . in order to qualify for an instruction on the defense of voluntary intoxication, the defendant must produce evidence sufficient to raise intoxication as an issue. To do this he must come forward with some evidence of the degree of intoxication which constitutes the defense. An abundance of evidence which does not meet the legal standard for the defense will not suffice. There must be some evidence that the defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime. A bald statement that the defendant had been drinking or was drunk is insufficient — insufficient not because it falls short of the quantum of evidence necessary, but because it is not evidence of the right thing. In order to merit an intoxication instruction in this case, the defendant must point to some evidence of mental impairment due to the consumption of intoxicants sufficient to negate the existence of the intent to kill.

State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100 (1984).

In the Committee's judgment, several aspects of the above standard should be emphasized. First of all, the burden does not always lie with the defendant to produce the evidence relevant to intoxication. Such evidence may be produced as part of the state's case. Second, the standard helpfully stresses that it is not sufficient to simply point to evidence tending to show intoxication. There must be evidence of intoxication that is relevant to the nonexistence of the mental element required for the particular criminal offense. The relevance of evidence of intoxication may vary depending on the mental element involved. For example, intoxication may be much more likely to be inconsistent with the mental element required for theft (knowledge that the property belonged to another person) than it is with, for example, the intent to kill. Third, the way the revised version of Wis JI-Criminal 765 is written should make it more acceptable to give an intoxication instruction rather than invite unnecessary litigation over whether the instruction should have been given. The revised instruction does not require the state to negate intoxication; it simply tells the jury that in determining whether the defendant acted with the required intent or knowledge, they should consider the evidence tending to show that he was intoxicated. The intent or knowledge is always an issue for the jury and they will almost always have heard the testimony regarding intoxication. Simply telling them they may consider the evidence they have already heard, but emphasizing that the mental state is the ultimate issue to which they must direct their attention, should involve very little risk that the jury will be confused or misled into giving inappropriate consideration to the intoxication issue.

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770 MISTAKE[1] — § 939.43(1)

ADD THE FOLLOWING TO THE INSTRUCTION[2] ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DESCRIPTION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF MISTAKE RELATES.

Mistake

Evidence has been received which, if believed by you, tends to show that the defendant believed that [HERE IDENTIFY THE DEFENDANT'S BELIEF].[3] You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense.

If an honest error of fact results in a person's not having the (intent) (knowledge)[4] required for a crime, the person is not guilty of that crime.

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).[5]

COMMENT

Wis JI-Criminal 770 was originally published in 1962 and revised in 1984, 1994, 1997, and 2005. This revision was approved by the Committee in June 2009.

The 2009 revision changed the first paragraph of the instruction to follow the approach used in Wis JI-Criminal 765, Voluntary Intoxication. In State v. Ludwig, No. 2008 AP2079-CR, [decided May 28, 2009, not published], the court of appeals held that the previous version of the instruction was in error in stating that the jury "must consider" evidence of the mistake that the defendant claims negated the mental state for the crime. The trial judge changed "must" to "may" and the court of appeals held this was error. But the court also held that the published instruction is in error in using "must." This is the same issue that arose with Wis JI-Criminal 765, Voluntary Intoxication, in 1995, and which was addressed in State v. Foster, 191 Wis.2d 14, 528 N.W.2d 22 (Ct. App. 1995). The 2009 revision of this instruction adopted the same approach as the one adopted for Wis JI-Criminal 765 in light of the Foster decision.

The mistake defense is applicable only to the extent that "an honest error" negates a mental element required for the crime. If a crime lacks a mental element, the defense of mistake is not available. In State v. Lindvig, 205 Wis.2d 100, 555 N.W.2d 197 (Ct. App. 1996), the court held that the defense of mistake was

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not available to a defendant charged with a violation of § 940.24, causing injury by the negligent operation of a dangerous weapon. This is because criminal negligence does not require a mental state; it is an objective standard that requires "conduct which the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another." See § 939.25. However, the Committee recommends caution in making any broad statements to the jury in an attempt to communicate this rule. This is because evidence of the defendant's mistaken belief about the circumstances may be relevant to a jury's determination about whether criminal negligence is established. For example, if there is evidence that a defendant believed that no one was present in the area where a dangerous weapon was being handled and if there is a basis for finding that the belief was reasonable, the jury must be allowed to consider that evidence in deciding whether the defendant should have realized that his or her conduct created an unreasonable and substantial risk. This consideration would not be under the label of a mistake defense, but rather would simply be part of the jury's consideration of whether the elements of the crime are established. For discussion of a related problem, see Wis JI-Criminal 926, Contributory Negligence.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm under § 948.03(3)(a). The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11. Note that the general definition of criminal recklessness in § 939.24 does require a mental element: awareness of an unreasonable and substantial risk of death or great bodily harm to another.

1. This is for the defense recognized by § 939.43, which reads as follows:

(1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.

(2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense.

Thus, the mistake can be one of fact or of law other than the criminal law. The commentary in the 1953 Report on the Criminal Code is helpful in explaining "mistake." It is included at the end of this Comment.

2. The Committee recommends that the instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the required mental state is defined. The Committee has concluded that this is the best way to instruct on defensive matters that are inconsistent with elements of a crime.

3. Here insert the mistake the defendant claims to have made (e.g., ". . . he had permission to use the automobile" — in a case of "operating without the owner's consent"). (See complete sample instruction in note 5, below.)

4. The mental state for most crimes is either intent (e.g., "intent to cause bodily harm") or knowledge (e.g., "knew that the owner did not consent").

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5. Here insert the mental state required for the crime charged (e.g., "knew the taking and driving of the automobile was without the owner's consent" — in a case of "operating without the owner's consent").

In a case involving a violation of § 943.23(2), taking and driving a vehicle without the owner's consent, the instruction would read as follows:

> Evidence has been received which, if believed by you, tends to show that the defendant believed that he had the permission of the owner to use the vehicle. You must consider this evidence in deciding whether the defendant knew that the owner did not consent to the taking and driving the vehicle.
>
> If an honest error of fact results in a person not having the knowledge required for a crime, the person is not guilty of that crime.
>
> Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant knew that the taking and driving of the automobile was without the owner's consent.

— — — — — — — — — — —

The commentary from the 1953 Report on the Criminal Code follows.

COMMENT. Criminal intent or any other mental element of crime is nearly always proved circumstantially, by inference from the actor's conduct. Mistake is a defense when it rebuts the inference of criminal intent or some other mental element necessary for the particular crime in question. Aside from this, there is no saving power in mistake. Two conclusions can be drawn immediately: (1) In crimes which do not require proof of a mental element, mistake is no defense; and (2) in crimes which require proof of a mental element, any mistake other than a mistake of criminal law which rebuts the inference of the existence of that mental element is a defense.

The defendant who raises the defense of mistake basically is contending that the state cannot establish a mental element essential to the crime charged. Since that mental element generally is criminal intent, it follows that the defense of mistake is closely related to the definition of criminal intent. A mistake as to the existence or constitutionality of the section under which the actor is prosecuted or as to the scope or meaning of the terms used in that section is not a defense because, as stated in the section on criminal intent, proof of knowledge of those things is not necessary for proof of criminal intent. For the same reason, a mistake as to the age of a minor is not a defense, although in the absence of the special provision in the section defining criminal intent making proof of knowledge of the age of a minor unnecessary, the state would generally have to prove that the actor knew the victim was under a certain age. On the other hand, if proof of knowledge of certain facts or law is necessary for proof of criminal intent, ignorance or mistake as to such facts or law (other than criminal law) is a defense.

An example may help to clarify the explanation. Assume that a statute provides that it is a crime to "intentionally cause physical damage to any property of another without his consent" and that "property of another" is defined to mean property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair. Assume as facts that the United States government when it first surveyed the land now belonging to the actor put thereon a stone slab as a survey marker and that the actor

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destroys this marker for the purpose of better utilizing his land. He may do so under any of several different beliefs which will have a bearing upon the defense of mistake:

Case 1. He destroys the marker, mistakenly believing that there is no statute prohibiting damage to property of another. Such a mistake is no defense for criminal intent does not require proof of knowledge of the existence of the statute under which the actor is prosecuted.

Case 2. He destroys the marker, mistakenly believing that the statute prohibiting damage to property of another is unconstitutional. Such a mistake is no defense, for criminal intent does not require proof of knowledge of the constitutionality of the statute under which the actor is prosecuted.

Case 3. He destroys the marker, mistakenly believing that the term "property of another" does not include property belonging to the United States government. Such a mistake is no defense, for criminal intent does not require proof of knowledge of the scope or meaning of terms used in the statute under which the actor is prosecuted.

Case 4. He destroys the marker, mistakenly believing that when he purchased the land he got title to the marker also. Such a mistake is a defense, for criminal intent requires proof of all those facts set forth after the word "intentionally" and which must be proved to exist in order to make out the objective part of the crime. If the actor believed the property to be his own, he could not have known it to be property of another. The fact that the actor's erroneous conclusion as to his property rights may have been based upon a mistake of law is immaterial.

Case 5. He destroys the marker, mistaking it for an ordinary rock. Such a mistake is a defense for the same reason that his mistake in Case 4 is a defense. In both cases, the mistake renders it impossible for the state to establish that he knew it was property of another that he damaged.

The above analysis shows that the efficacy of mistake as a defense does not depend entirely on whether the mistake is one of fact or one of law. In both Case 3 and Case 4, the mistake is one of law; in Case 3, the mistake is not a defense while in Case 4 it is. The distinction between the two is that in Case 3, the mistake goes to the meaning of a term used in the statute under which the actor is prosecuted, while in Case 4, the mistake is as to nonpenal or property law which under the particular statute is an essential basis for a factual conclusion necessary for criminal intent.

The claim of mistake must of course be honest rather than spurious. The use of the term "honest error" in the section is merely for the purpose of emphasizing that point. However, if the mistake is real and it negatives a state of mind essential to the crime, the actor is entitled to the defense even though the mistake is unreasonable. It may be difficult for a defendant to raise a reasonable doubt that his mistake was real if it appears to be unreasonable, but this is a problem of proof and not a matter of substantive law.

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772 ACCIDENT

ADD THE FOLLOWING TO THE INSTRUCTION ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DESCRIPTION OF THE ELEMENT TO WHICH THE EVIDENCE OF ACCIDENT RELATES.[1]

Accident

The defendant contends that (he) (she) did not act with (describe mental state),[2] but rather that what happened was an accident.

If the defendant did not act with the (describe mental state) required for a crime, the defendant is not guilty of that crime.

Before you may find the defendant guilty of (name charged crime),[3] the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

Wis JI-Criminal 772 was originally published in 2002. This revision was approved by the Committee in December 2004.

This instruction is intended to provide a suggested format for instructing the jury on the defense of "accident." In State v. Watkins, 2002 WI 101, 255 Wis.2d 265, 647 N.W.2d 244, the Wisconsin Supreme Court recognized that "'[a]ccident' is a defense to homicide recognized at common law and specifically recognized in Wisconsin statutes dating back to 1849." 2002 WI 101, ¶33. The defense survived the revision of the homicide statutes in the 1950's as "a defense that negatives intent, and may negative lesser mental elements." 2002 WI 101, ¶41. Because the significance of evidence of accident is its tendency to negate an element — usually, the mental element — the state overcomes the defense by proving that element beyond a reasonable doubt.

Watkins involved a death caused by the discharge of a firearm during an encounter between the defendant and the victim. The incident occurred in a motel room with no witnesses present. The defendant was charged with first degree intentional homicide and raised the defense of accident. That is, the defendant claimed he did not cause the death with intent to kill because the firearm discharged accidentally. If the format suggested by Wis JI-Criminal 772 was used to instruct the jury on this claim, it would read as follows:

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The defendant contends that he did not act with the intent to kill, but rather that what happened was an accident.

If the defendant did not act with the intent required for a crime, the defendant is not guilty of that crime.

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant acted with the intent to kill.

Because evidence tending to show accident is significant only to the extent that it negates an element of the crime, it can be argued that a special jury instruction is not necessary. A jury finding that the element is established necessarily establishes that evidence of accident is not sufficient to negate that element. However, this is also true with the statutorily-recognized defenses of voluntary intoxication, see § 939.42(2) and Wis JI-Criminal 765, and mistake, see § 939.42(2) and Wis JI-Criminal 770. The Committee concluded that where the evidence has referred to "accident" as a defense, the jury's understanding will be aided by an instruction that puts the evidence in its proper context.

1. The Committee recommends that this instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the element to which evidence of accident relates is defined. Usually, this will be the mental state required for the crime, but other elements could be involved. The test should simply be one of relevance: does the evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See, § 904.01.

2. Here describe the element to which the evidence of accident relates. This will usually be the mental state, such as, intent to kill. For cases involving recklessness, the relevant mental state would be "awareness of the risk."

3. The Committee suggests identifying the crime to which the defense of accident relates because in some cases lesser included offenses may be submitted for which the evidence of accident might not be relevant. For example, evidence that a firearm discharged accidentally would tend to show the absence of intent to kill [required for intentional homicide] but may not tend to show the absence of awareness of the risk of death or great bodily harm [required for reckless homicide]. The relevance of the evidence must be analyzed separately for each crime that is to be submitted to the jury.

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775 ALIBI

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

TO BE GIVEN ONLY ON THE REQUEST OF THE DEFENDANT[1]

Alibi

There is evidence in this case that at the time of the commission of the offense charged, the defendant was at a place other than that where the crime occurred.[2]

It is not necessary for the defendant to establish that he was not present at the scene of the crime or that he was at some other place. The burden is upon the State to convince you beyond a reasonable doubt that the defendant committed the offense as charged.

COMMENT

Wis JI-Criminal 775 was originally published in 1962 and revised in 1984 and 1995. This revision was approved in December 2004.

1. The Committee recommends that this instruction be given only when requested by the defendant. The state is required to prove that the defendant committed the crime, and it is obvious that if the defendant was somewhere else when the crime was committed, he did not commit it. To call this an "alibi" and specially instruct on it strikes the Committee as unnecessary, unless the defendant makes a specific request.

2. In the former version of this instruction, the following sentence appeared at this point: "This is what is known in the law as an alibi." While it is not reversible error to use the word "alibi" in the instruction (State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978)), the Committee concluded that it is preferable not to, because it may have prejudicial connotations to the jury. However, if the lawyers or witnesses have used "alibi," it is recommended that the following be added at the beginning of the instruction:

> References have been made to the defendant having an "alibi." The word, "alibi," is simply the Latin word for "elsewhere." It is used as a shorthand method of describing evidence that the defendant was elsewhere at the time the alleged crime took place.

See Logan v. State, 43 Wis.2d 128, 135, 168 N.W.2d 171 (1969).

Section 971.23(8) sets forth the procedural requirements that apply to the presentation of alibi evidence. Exclusion of the defendant's own testimony may not be a proper remedy for failure to comply with the statute's notice requirements. Less drastic measures, such as granting a continuance to the state to allow it to prepare for such testimony, should be explored. See Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982). Also see State v. Burroughs, 117 Wis.2d 293, 344 N.W.2d 149 (1984).

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780 ENTRAPMENT

SUBSTITUTE THE FOLLOWING FOR THE FINAL TWO PARAGRAPHS OF THE INSTRUCTION FOR THE CRIME CHARGED.[1]

Whether You Should Consider the Defense of Entrapment

You should consider the defense of entrapment only if you are satisfied beyond a reasonable doubt that the defendant committed all the elements of (name of offense).

If you are not so satisfied, you must find the defendant not guilty, and you need not consider entrapment.

The Meaning of "Entrapment"

"Entrapment" is a defense available to defendants when a law enforcement officer has used improper methods to induce them to commit an offense they were not otherwise disposed to commit.[2]

Did Police Induce the Defendant?

First consider whether police induced the defendant to commit the crime. "Induce" means to persuade or influence someone to do something.[3] Giving someone the opportunity to commit the crime is not the same as inducing or persuading someone to commit the crime.[4]

ADD THE FOLLOWING WHEN ILLEGAL SALE OR PROSTITUTION IS INVOLVED.

[A mere offer to buy does not create more than the usual opportunity to commit an offense. For example, when the police desire to obtain evidence against a person who they

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have some reason to believe is (selling controlled substances) (selling obscene literature) (selling liquor after hours) (engaged in prostitution), it is not improper for the police to pretend to be somebody else and to offer, either directly or through an informer or other decoy, (to purchase the goods which are being sold illegally) (to have intercourse for money). When that occurs, the police are creating only the usual opportunity to commit this kind of an offense.][5]

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that there was inducement.[6]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

If you are not satisfied that police induced the defendant to commit the crime, you should find that the defendant was not entrapped and need not consider any other issues relating to entrapment.

If you are satisfied that police induced the defendant to commit the crime, you must consider whether the defendant was entrapped.

The State's Burden Of Proof

If you are satisfied that police induced the defendant to commit the crime, the state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not entrapped.

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The state may prove that the defendant was not entrapped by showing either:

- that the inducement was not excessive; or,
- that the defendant was predisposed to commit the crime before being induced.

Was There Excessive Inducement?

The law recognizes that, in the enforcement of the law, it is often necessary for law enforcement officers to afford persons the freest opportunity to commit offenses which those persons are disposed to commit. Some inducement, encouragement, or solicitation by law enforcement officers is, therefore, permissible. But it is not proper for them to use excessive incitement, urging, persuasion, or temptation.[7] Inducement is excessive when it is likely to induce the commission of an offense by a person not already disposed to commit an offense of that kind. It is the duty of law enforcement officers to detect criminals but not to create them.

Was the Defendant Predisposed To Commit the Crime?

Entrapment is present when a person who is not predisposed to commit a crime is induced or persuaded to do so by law enforcement officers. If a person is predisposed to commit a crime, then entrapment is not present, even though law enforcement officers or their agents did induce the person to commit a crime.

In determining whether the defendant was predisposed to commit the crime charged, you may consider the defendant's personal background, the nature and extent of any inducements

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of the law enforcement officer, and all the other circumstances relating to the alleged offense.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed all _____ elements of (name of offense)[9] and that the defendant was not entrapped, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 780 was originally published in 1971; the Comment was updated in 1986 and 1991. An alternative, Wis JI-Criminal 780A, was published in 1985 and withdrawn in 2001. This revision was approved by the Committee in September 2001.

The instruction was substantially revised in 2001 in an attempt to increase its understandability. The text reorganizes the material of the prior version but retains its substance, which had been approved in several appellate decisions. See, State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986), and State v. Hillesheim, 172 Wis.2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992).

This revision provides for integrating the instruction on the defense with the instruction on the elements of the crime. It retains the dual burden of proof approach that was reaffirmed as the law of the state in State v. Saternus, supra. ["Dual burden" refers to the requirement that the defendant establish inducement by satisfying the civil burden of proof, which imposes a duty on the state to prove beyond a reasonable doubt that entrapment was not present.] The Saternus court summarized its holding as follows:

> In short, there is nothing in the statutes, the legislative history of sec. 939.70, Stats., the common law of Wisconsin, or in federal law which prohibits or limits the right of this court to place the burden of persuasion by a preponderance of the evidence on a defendant to show inducement—and, of course, the final burden, that of proving beyond a reasonable doubt that even an "induced" defendant had a prior disposition to commit the crime, concededly rests upon the state. Those burdens were correctly stated by this court in Hawthorne and were correctly incorporated in the jury instructions used in this case. 127 Wis.2d 460, 480-81.

From 1985 to 2001, an alternative version was published, JI 780A, which eliminated the defendant's burden to prove inducement. JI 780A was withdrawn in 2001 in light of the observation in Saternus that "the

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alternative instruction does not reflect the decisions as determined by Hawthorne and other holdings of this court." 127 Wis.2d 460, 481, n. 13.

This instruction reflects the following interpretation of the substance of the entrapment defense:

- the defendant may meet the burden to prove inducement by showing inducement of any kind -- there need not be a showing of excessive or improper inducement at this stage;
- if the defendant does show inducement, the state assumes the burden to prove that entrapment was not present and may do so in either of two ways:
  - by showing that the inducement was not excessive or improper; or,
  - by showing that the defendant was predisposed to commit the crime; and,
- if the state proves that the defendant was predisposed to commit the crime, no amount of inducement is improper.

The defense of entrapment, while adopted in almost all jurisdictions, is not based on the United States Constitution. Thus, while decisions of the U.S. Supreme Court and the federal courts are often referred to in connection with the entrapment defense, those decisions are not binding on the states. The two leading Wisconsin cases are State v. Hochman, 2 Wis.2d 410, 413, 86 N.W.2d 446, 448 (1957) and Hawthorne v. State, 43 Wis.2d 82, 168 N.W. 85 (1969).

In State v. Hochman, the Wisconsin Supreme Court defined entrapment as follows: "Entrapment is the inducement of one to commit a crime not contemplated by him for the mere purpose of instituting criminal prosecution against him." In Hawthorne v. State, the court adopted the "origin of intent" test and further held that the accused has the burden to show by a preponderance of the evidence that the inducement occurred and the state has the burden to show beyond a reasonable doubt that the accused has a prior disposition to commit the crime. The Wisconsin analysis follows that developed by the United States Supreme Court in Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958).

The most recent entrapment decision of the United States Supreme Court is Jacobson v. United States, 503 U.S. 540, 549 (1992), holding that in federal prosecutions, the government "must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."

Evidentiary Basis for Instructing On Entrapment

The Wisconsin Court of Appeals reversed a conviction for failure to submit an entrapment instruction in State v. Schuman, 226 Wis.2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999), identifying the proper evidentiary standard as follows:

> Only "slight evidence' is required to create a factual issue and put the defense before the jury. United States. v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993). . . The evidence may be "weak, insufficient, inconsistent or of doubtful credibility,"United States. v. Sotlo-Murillo, 887 F.2d 176,

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178 (9th Cir. 1989) . . . ; but the defendant is entitled to the instruction unless the evidence is rebutted by the prosecution to the extent that no rational jury could entertain a reasonable doubt as to either element." United States. v. Hoyt, 879 F.2d 505, 509 (9th Cir. 1989).

Entrapment and Denial of Guilt

In Mathews v. United States, 485 U.S. 58, 62 (1988), a case involving a federal prosecution originating in Milwaukee, the Court held "that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." The holding resolved a split in the federal courts, where several circuits had held that a defendant must "admit the offense" in order to claim entrapment. The Supreme Court addressed the issue by referring to general principles that entitle a defendant to an "instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews at 63. This extends even to inconsistent defenses, if supported by the evidence.

The Mathews holding involves the standard for entrapment in federal courts and is not binding on state courts because entrapment is not constitutionally based. Wisconsin cases suggest a contrary result. In State v. Jansen, 198 Wis. 2d 765, 543 N.W.2d 552 (Ct. App. 1995), the defendant was charged with attempted possession of marijuana with intent to deliver. In a bench trial, the court found him not guilty of that crime because he was entrapped and because intent to deliver was not proven. But the court found him guilty of the lesser included offense of simple possession. The court of appeals held this was error because it is bound by State v. Monsoor, 56 Wis.2d 689, 203 N.W.2d 20 (1973), which held that a defendant who stands on the entrapment defense could not request instructions on lesser included charges. But see, Hawthorne v. State, 43 Wis.2d 82, 94, 168 N.W. 85 (1969): "It does not seem logical to force the defendant to admit guilt in order to raise the issue of entrapment. . . [and providing examples.]

1. The Committee has determined that instructions on "defenses" should be combined with the instruction on the elements of the crime. See State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. This statement is based on State v. Hochman, 2 Wis.2d 410, 413-14, 86 N.W.2d 446 (1957).

3. This is based on the common dictionary definition of "induce." See, for example, The American Heritage Dictionary of the English Language, 3rd Edition, 1992, at p. 921: "To lead or move, as to a course of action, by influence or persuasion."

4. This statement is based on State v. Hochman, 2 Wis.2d 410, 414, 86 N.W.2d 446 (1957).

5. State v. Hillesheim, 172 Wis.2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992); State v. Bjerkaas, 163 Wis.2d 949, 955, 472 N.W.2d 615 (Ct. App. 1991).

6. Placing the burden of persuasion on the defendant, and using the civil burden, was approved in State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986).

7. "Simply cultivating a friendship with a person . . . does not constitute entrapment." State v. Bjerkaas, 163 Wis.2d 949, 956, 472 N.W.2d 615 (Ct. App. 1991), citing, State v. Boutch, 60 Wis.2d 443, 449, 210 N.W.2d 730 (Ct. App. 1973).

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8. Evidence of conduct occurring after the charged offense may be admissible if it is relevant to predisposition. State v. Monsoor, 56 Wis.2d 689, 703-04, 203 N.W.2d 20 (1973); State v. Pence, 150 Wis.2d 759, 442 N.W.2d 540 (Ct. App. 1989). There is no fundamental difference in the analysis whether the evidence is treated as other acts evidence under § 904.04(2) or character evidence under §§ 904.04(1) and 904.05(2). Pence, at 758-60.

9. Refer to the uniform instruction for the charged crime for the number of elements and the short title of the crime. For example, for a charge of delivering a controlled substance, the statement would read as follows:

> If you are satisfied beyond a reasonable doubt that the defendant committed all three elements of delivery of a controlled substance and that the defendant was not entrapped, you should find the defendant guilty.

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780A ENTRAPMENT: ALTERNATE FORM

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 780A was originally published in 1985; it was withdrawn in 2001.

Wis JI-Criminal 780A provided an alternate form for submitting entrapment which eliminated the defendant's burden to prove inducement. It was withdrawn in 2001 in light of the observation in State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986), that "the alternative instruction does not reflect the decisions as determined by Hawthorne and other holdings of this court." 127 Wis.2d 460, 481, n. 13.

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790 COERCION — § 939.46

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[1]

Coercion

The defense of coercion is an issue in this case. The defense of coercion allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of coercion.[2]

The law allows the defendant to act under the defense of coercion only if a threat by another person (other than the defendant's co-conspirator)[3] caused the defendant to believe that his act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)][4] and which pressure caused him to act as he did.

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,[5] and that the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 790 was originally published in 1984 and revised in 1995. This revision was approved by the Committee in December 2004.

This instruction deals with the defense of coercion which is defined by § 939.46 as follows:

> **939.46 Coercion.** (1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is for first degree intentional homicide the degree of the crime is reduced to second degree intentional homicide.
>
> (2) It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any presumption of coercion when a crime is committed by a married person in the presence of the spouse.

Coercion is closely related to the defense of necessity, see § 939.47 and Wis JI-Criminal 792. The distinction between the two defenses is that with coercion, the outside force which influences the actor has its source in the actions of other human beings. Necessity involves natural physical forces beyond the actor's control which force him to choose committing the crime as the lesser of two evils. United States v. Bailey, 444 U.S. 394 (1980). For application of this defense to prison or jail escape, see Comment to Wis JI-Criminal 1774.

Coercion is a complete defense to all crimes except first degree intentional homicide, which coercion reduces to second degree intentional homicide. See §§ 939.46(1) and 940.01(2)(d). For cases where first degree intentional homicide is charged, coercion should be handled in the same manner as other mitigating circumstances, such as adequate provocation (see Wis JI-Criminal 1014) and unnecessary defensive force (see Wis JI-Criminal 1016). For cases involving criminal recklessness, coercion is best addressed by including its consideration as part of the determination whether the conduct presents an unreasonable and substantial risk. In cases involving first degree reckless charges, whether the circumstances show "utter disregard for human life" also requires evaluation of facts relating to coercion. See Wis JI-Criminal 1020 for a model.

For a case finding the evidence insufficient to raise the coercion defense, see State v. Keeran, 2004 WI App 4, 268 Wis.2d 761, 674 N.W.2d 570.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Coercion can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on coercion with that for the underlying crime by inserting Wis JI-Criminal 790 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions

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could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the state to disprove an asserted coercion defense beyond a reasonable doubt.

3. The threat must come from someone "other than the actor's co-conspirator." § 939.46(1). If there is an issue about the threat coming from a co-conspirator the phrase should be included in the instruction. It may also be appropriate to instruct the jury on the meaning of "co-conspirator." Wis JI-Criminal 570 defines the crime of "conspiracy."

4. The defense apparently applies where the threat is made to any third person, without limitation. In this respect, coercion has been likened to the defense of others under § 939.48(4), Wis. Stats. See 1950 Report on the Criminal Code of the Wisconsin Legislative Council, pages 35-36 and 38-39.

5. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as coercion, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of coercion would result in the following:

> If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

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792 NECESSITY — § 939.47

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[1]

Necessity

The defense of necessity is an issue in this case. The defense of necessity allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of necessity.

The law allows the defendant to act under the defense of necessity only if the pressure of natural physical forces[2] caused the defendant to believe that his act was the only means[3] of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)] and which pressure caused him to act as he did.[4]

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of this offense have been proved,[5] and that the defendant did not act lawfully under the defense of necessity, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 792 was originally published in 1995 and revised in 1996. This revision was approved by the Committee in December 2004.

This instruction deals with the defense of necessity which is defined by § 939.47 as follows:

> 939.47 Necessity. Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.

Necessity is closely related to the defense of coercion, see § 939.46 and Wis JI-Criminal 790.

Necessity is a complete defense to all crimes except first degree intentional homicide, which necessity reduces to second degree intentional homicide. See §§ 938.46(1) and 940.01(2)(d). For cases where first degree intentional homicide is charged, necessity should be handled in the same manner as other mitigating circumstances, such as adequate provocation (see Wis JI-Criminal 1014) and unnecessary defensive force (see Wis JI-Criminal 1016). For cases involving criminal recklessness, necessity is best addressed by including its consideration as part of the determination whether the conduct presents an unreasonable and substantial risk. In cases involving first degree reckless charges, whether the circumstances show "utter disregard for human life" also requires evaluation of facts relating to necessity. See Wis JI-Criminal 1020 for a model.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Necessity can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on necessity with that for the underlying crime by inserting Wis JI-Criminal 792 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. In State v. Olsen, 99 Wis.2d 572, 299 NW.2d 632 (Ct. App. 1980), the court held that the defense of necessity was unavailable as a matter of law to a demonstrator who sought to stop the transportation of spent nuclear fuel. The court held that the defense is limited to the pressure of forces such as:

> . . . storms, fires and privations. Thus, a person lost in a storm who breaks into an isolated house in order to take refuge is justified in so doing by the doctrine of necessity. A person who, seeking to stop the spread of a fire, razes a building in order to save a town is similarly justified. A third example is that of a person who throws property from an overcrowded boat in order to prevent it from sinking. 99 Wis.2d 572, 576.

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Similar examples were provided in the 1953 Legislative Council Report on the Criminal Code, Comment to § 339.47, which was adopted, with minor changes, as § 939.47. Also see LaFave and Scott, Substantive Criminal Law, Sec. 5.4 (West, 1986).

In State v. Anthuber, 201 Wis.2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996), the court rejected a claim that heroin addiction, coupled with the Department of Corrections refusal to provide him with methadone treatment, established a necessity defense: ". . . the 'force' affecting Anthuber was not a 'natural physical force' because he set it in motion when he made the decision to start using heroin **and** there is no evidence that he had no control over whether to make this initial choice." 201 Wis.2d 512, 520.

3. In State v. Horn, 126 Wis.2d 447, 377 N.W.2d 176 (Ct. App. 1985), the defendants challenged their convictions for criminal trespass, which arose out of their refusal to leave a health care facility that provided abortions. They alleged that the trial court erred in ruling as a matter of law that the defenses of coercion and necessity were not available to them. The appellate court affirmed the conviction, holding that since the abortion services provided by the clinic were legal:

> . . . it is unreasonable [for the defendants] to believe that one must commit an act of criminal trespass in order to prevent an activity that is legal and constitutionally protected. If appellants wish to attempt to change the legal status of abortion, they must do so within channels provided by our democratic form of government. A contrary holding would allow an individual to violate the law without sanction whenever he felt that government had not made the proper choice between conflicting values.

126 Wis.2d 447, 456.

4. The statement of the necessity defense is taken almost verbatim from § 939.47. The only change is to split the statutory definition into two parts: the first describes the belief required; the second describes the requirement that the belief be reasonable. This is the way other privileges are defined in the instructions — see, for example, Wis JI-Criminal 800 Privilege: Self Defense.

In State v. Anthuber, 201 Wis.2d 512, 538, 549 N.W.2d 477 (Ct. App. 1996), the court cited an earlier decision as identifying four elements of the necessity defense:

1) the defendant must have acted under pressure from natural physical forces;

2) the defendant's act was necessary to prevent imminent public disaster, or death, or great bodily harm;

3) the defendant had no alternative means of preventing the harm; and

4) the defendant's beliefs were reasonable.

Citing, State v. Olsen, note 2, supra, at 577-78.

In a footnote, the Anthuber decision noted that Wis JI-Criminal 792 takes a different approach and stated: "While we find no substantive difference in the two tests, we nonetheless believe that the four-part test is simpler to understand and discuss." 201 Wis.2d 512, 518-19, at note 1. The Committee carefully reviewed the issue and decided not to change the text of the instruction. First, the instruction follows the words of the

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statute. Second, the Olsen decision did not actually set forth four separate "elements" in the manner summarized in Anthuber. And third, there may be a substantive difference. The statute, and the text of the instruction, require that the defendant reasonably believe that the act was necessary to prevent the harm and reasonably believe that no alternative means existed. The statute does not require, as suggested by the "four elements" approach, that the defendant's act actually be necessary to prevent the harm and that there actually be no alternative means. A reasonable belief as to each aspect is sufficient.

5. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as necessity, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of necessity would result in the following:

> If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant did not act lawfully under the defense of necessity, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

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795 LAW NOTE: PRIVILEGE: RESISTING AN UNLAWFUL ARREST

This Law Note discusses the common law privilege recognizing a right to resist an unlawful arrest.

The Privilege Was Recognized But Has Been Abrogated

In State v. Hobson, 218 Wis.2d 550, 577 N.W.2d 825 (1998), the Wisconsin Supreme Court addressed the question whether a defendant charged with battery to a law enforcement officer could claim a privilege to resist an unlawful arrest. The court's holding was as follows:

> We conclude, based on the common law in this state, that Wisconsin has recognized a privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. However, based upon public policy, we now decide to abrogate[1] that common law affirmative defense. Our decision to abrogate has prospective application only.
> 218 Wis.2d 350, 353.

The Abrogation Is Prospective

The Hobson decision was filed on May 27, 1998, and thus bars the invocation of the privilege to resist an unlawful arrest in any prosecution based on acts occurring after that date.[2]

Resisting An Arrest Where Unreasonable Force Is Used

Hobson was concerned with a situation where the arrest was unlawful because probable cause was lacking. The privilege the court recognized and then abrogated was a privilege "to forcibly resist unlawful arrest in the absence of unreasonable force." Not addressed is the privilege to resist an arrest where unreasonable force is used by the arresting officer. It seems clear that the general privilege of self defense defined in § 939.48 could apply to the unreasonable force situation: the unreasonable force would be the "unlawful interference" that is the predicate for invoking self defense. The majority opinion in Hobson appears to hold that self defense is the proper way to address this issue. 218 Wis. 2d 350, 368, note 17. A concurring opinion suggests that there is an additional common law privilege to resist an unreasonable force arrest that is separate from self defense. 218 Wis.2d 350, 387-88.

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Lawfulness Of Arrest Can Be Relevant To An Element Of A Crime

Hobson was concerned with a privilege that was a true "affirmative defense" in the sense that it provided a defense that prevented conviction even though all the elements of the crime charged were present. That is, Hobson did commit a battery against a law enforcement officer, but claimed a defense to that crime based on facts that were not inconsistent with the presence of any of the elements of the crime. Notwithstanding the Hobson decision, the fact that a police officer was acting unlawfully in making an arrest would prevent a conviction for certain offenses because it may be inconsistent with the proof of an element of the crime. For example, if the charge is resisting or obstructing an officer, an element of the crime is that the officer was acting "with lawful authority." See § 946.41. An officer making an unlawful arrest would not be acting with lawful authority, thus negating an element of the crime. Battery to a law enforcement officer, the offense charged in Hobson, does not have a "with lawful authority" element.

COMMENT

Wis JI-Criminal 795 was approved by the Committee August 2002.

1. A definition of "abrogate" was noted by the court: "To annul, cancel, revoke, repeal, or destroy." State v. Hobson, 218 Wis.2d 350, 353, footnote 1.

2. Principles based on the Ex Post Facto clauses of the United States and Wisconsin Constitutions require prospective application of a "new rule of law [that] deprives a defendant of a previously available defense." 218 Wis.2d 350, 381.

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800 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[1] with the defendant's person; and,
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[2] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[3] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

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[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all __ elements of _____[4] have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 800 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in June 2000 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment.

This instruction is intended for use with crimes involving the intentional causing of bodily harm. For cases involving criminal recklessness or criminal negligence, see Wis JI-Criminal 801. For cases involving the intentional use of force intended or likely to cause death or great bodily harm, see Wis JI-Criminal 805.

The instructions for homicide offenses include models for cases involving self-defense. See Wis JI-Criminal 1014, 1016, 1017, and 1052.

The 1994 revision of this instruction changed its format to allow integrating the description of self-defense with the instruction for the crime charged. The Committee concluded that this provides a clearer statement of the facts necessary to constitute guilt in a case when self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

For examples integrating the self-defense instruction with instructions for battery, see Wis JI-Criminal 1220A - 1225A.

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1. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." § 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

2. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

3. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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801 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM: CRIMES INVOLVING RECKLESSNESS OR NEGLIGENCE — § 939.48)

[INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS OF THE CRIME ARE DEFINED.]

Self-Defense

Self-defense is an issue in this case. In deciding whether the defendant's conduct [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct],[1] you should also consider whether the defendant acted lawfully in self-defense.

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[2] with the defendant's person; and;
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

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[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[3] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[4] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.]

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.

FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:[5]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not

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act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[6]

FOR FIRST DEGREE RECKLESS OFFENSES, ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD FOR HUMAN LIFE" ELEMENT:[7]

[You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.][8]

CONTINUE WITH THE CONCLUDING PARAGRAPHS OF THE INSTRUCTION.

COMMENT

Wis JI-Criminal JI-Criminal 801 was originally published in 1993 and revised in 2001 and 2014. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 6 and 8. This revision was approved by the Committee in October 2018; it added to the Comment.

This instruction is intended for use with crimes involving criminal recklessness or criminal negligence. See §§ 940.02(1), 940.06, 940.08, 940.23, 940.24, 941.20, 941.30, and 948.03(3). Wis JI-Criminal 800 is intended for use with crimes involving the intentional causing of bodily harm.

A case illustrating the application of self-defense to criminal recklessness and criminal negligence is State v. Langlois, 2018 WI 73, 382 Wis.2d 414, 913 N.W.2d 812. The defendant was charged with 1st degree reckless homicide; 2nd degree reckless homicide and homicide by negligent handling of a dangerous weapon were submitted as lesser included offenses. (See Wis JI-Criminal 1023, which provides an instruction for this sequence of offenses). There was evidence of self-defense in the case. The defendant alleged it was error for the trial court to fail to repeat that the burden was on the prosecution to prove beyond a reasonable doubt that the defendant was not privileged to act in self-defense when addressing the lesser included offenses. Instead, the court's instructions stated "as I previously indicated," referring to the definition given when instructing on 1st degree reckless homicide which included a full description of the burden of proof. The court held that this was not error – the context made the reference clear. In the Committee's judgment, it is best practice to repeat the full statement of the burden of proof with each of the lesser included offenses.

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1. The Committee concluded that the description of the privilege should be integrated with the definitions of recklessness or negligence. This is because both concepts require that conduct create an unreasonable risk of death or great bodily harm. A risk is not unreasonable if the conduct undertaken is a reasonable exercise of the privilege of self-defense. Because criminal recklessness or criminal negligence and lawful actions in self-defense cannot coexist, it is best to advise the jury to consider the law relating to self-defense when considering those elements.

For example, the issue of self-defense might arise in a case where the defendant is charged with recklessly causing great bodily harm in violation of § 940.23. Wis JI-Criminal 1250 provides that the second element of that offense is that the defendant recklessly caused harm. Wis JI-Criminal 801 should be added to the definition of "recklessly" in Wis JI-Criminal 1250 if the evidence provides the basis for the privilege of self-defense.

This approach treats the privilege differently in recklessness cases than in cases involving the intentional causing of harm. In the latter, intent to cause harm and self-defense can exist at the same time. Thus, the absence of the privilege is identified as a fact the state must prove in addition to the statutorily defined elements of the intentional crime. See Wis JI-Criminal 800.

2. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." § 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

3. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

4. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines.

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However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

5. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

6. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

7. The Committee concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless offenses. Conduct does not show utter disregard for human life if it is undertaken in the reasonable exercise of the privilege of self-defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

8. The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 6, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.

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805 PRIVILEGE: SELF-DEFENSE: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[1] with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[2] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[3] The reasonableness of the defendant's beliefs must

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be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all __ elements of _____[4] have been proved and that the defendant did not act lawfully in self defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 805 was originally published in 1966 and revised in 1993. This revision was approved by the Committee in June 2000 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment.

The 1994 revision of this instruction changed its format to allow integrating the description of self-defense with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800. Instructions for homicide offenses include models for cases involving self-defense. See Wis JI-Criminal 1014, 1016, 1017, and 1022.

1. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." Section 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable.

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The word "unlawful" also appears in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. [See Wis JI-Criminal 815.] In State v. Bougneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 could constitute "unlawful conduct" for the purposes of § 939.48(2).

The "unlawful" component of "unlawful interference" is just one part of the predicate for invoking the privilege of self-defense. As stated in the instruction, the defendant must have believed "that there was an actual or imminent unlawful interference with the defendant's person and [must have] believed the amount of force he used or threatened to use was necessary to prevent or terminate the interference."

2. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

3. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

Another situation where the personal circumstances become important in defining the self-defense standard is in a case involving a battered spouse. Wisconsin cases dealing with the subject have tended to use doctrines other than self-defense in these cases. In State v. Hoyt, 21 Wis.2d 284, 128 N.W.2d 645 (1964), for example, the theory of defense related to "heat of passion, caused by reasonable and adequate provocation" rather than self-defense. Likewise, in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983), provocation and not guilty by reason of mental disease were considered to be the relevant doctrines. However, some cases of this type may legitimately be considered under self-defense rules: the history of abuse between the spouses may be relevant to evaluating whether the defendant's belief in the need to use force was reasonable. See, for example, State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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805A LAW NOTE: SELF-DEFENSE UNDER § 939.48(1m)

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B. The new rule does affect what a defendant must show to have the privilege submitted to the jury – that is, it provides another way for the defendant to meet the burden of production. 5

- "The court" refers to the trial judge, not the jury.
- "The court shall presume" does not affect the state's burden of persuasion.
- "The court . . . shall presume" provides another way for the defendant to meet the burden of production.

C. When a defendant asserts the privilege of self-defense under the new rule, the "some evidence" test is applied to the predicate facts. 8

D. When self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change. 9

E. The state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction. 9

F. When self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given. 10

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Scope

This Law Note explains the Committee's conclusions about how to implement the provisions of § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.] The provisions of sub. (1m) relate to what is commonly termed the "Castle Doctrine," but caution should be used in relying on that term to accurately describe the new provision. While it is a convenient term, the substance of the "Castle Doctrine" varies state by state; Wisconsin's version is more limited than that of Florida,[1] for example. This Law Note uses the term "the new rule."

The Committee's primary conclusions about the new rule are that it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege, but that it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production. These conclusions are explained in Section II.

The primary focus of the Committee's work on the new rule was on how to implement it procedurally. But there are also issues with respect to its substance. These issues, under the Committee's approach that the new rule goes only to the defendant's burden of production, will not need to be defined for the jury. But they will be important to the judge in deciding whether the defendant meets the burden of production.

I. The Substance of the New Rule in § 939.48(1m).

The key part of the new provision is set forth in sub. (1m) (ar), which reads as follows:

> (ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:
>
> 1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.

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2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

In the discussion that follows, the requirements set forth in subdiv. 1. and 2. are referred to as the "predicate facts."

The new rule addresses the use of force by a person against someone who has unlawfully and forcibly entered the person's dwelling, motor vehicle, or place of business (or is in the process of doing so). The new rule does not define "unlawfully" or "forcibly." However, § 939.48(6) provides: "In this section, 'unlawful' means either tortious or expressly prohibited by criminal law or both." Thus, the definition in sub. (6) should apply to the new rule. With respect to "forcibly," the standard instructions for robbery use the term "forcibly" to refer to either the use or threat of use of force. See Wis JI-Criminal 1479.

Some of the terms used are defined in the new rule. Section 939.48(1m)(a)1. defines "dwelling": "'Dwelling' has the meaning given in s. 895.07(1)(h)." Section 895.07(1)(h) provides as follows:

"Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basement.[2]

Section 939.48(1m)(a)2. defines "place of business" as "a business that the actor owns or operates."

The predicate facts that are the basis for the new rule are subject to exceptions set forth in § 939.48(1m)(b). These must be evaluated by the court in determining whether a defendant has met the burden of production on the new rule. The court must find that the exceptions do not apply and that there is some evidence of the predicate facts for the new rule.

Section 939.48(1m)(b) provides:

(b) The presumption described in par. (ar) does not apply if any of the following applies:

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1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

2. The person against whom the force was used was a public safety worker, as defined in s. 941.375 (1) (b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:

a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.

b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

Section 941.375 (1) (b) defines "public safety worker" as follows:

"Public safety worker" means an emergency medical services practitioner licensed under § 256.15, an emergency medical responder certified under §256.15(8), a peace officer, a fire fighter, or a person operating or staffing an ambulance.

II. The Committee's Conclusions

The Committee has reached the following conclusions about the new rule set forth in § 939.48(1m):

• it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege;

• it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production;

• when self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change;

• the state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction; and,

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• when self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

The Committee realizes that this approach differs from what some may believe to be the impact of the new rule. However, the Committee believes that this approach is the one that is most faithful to the statutory language. The key aspects of the Committee's analysis are described in detail below.

A. The new rule does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege.

The new rule applies where "the actor makes . . . a claim under sub. (1)," referring to sub. (1) of § 939.48, which is the definition of the privilege of self-defense.[3] Because the new rule plays a role only if "the actor makes . . . a claim under sub. (1)," the new rule is tied to the definition of the existing privilege and does not create an alternative to the existing privilege. The existing privilege under sub. (1), was not changed by Act 94. As applied to the use of deadly force, § 939.48(1) still requires that the actor "reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself or herself."

B. The new rule does affect what a defendant must show to have the privilege submitted to the jury – that is, it provides another way for the defendant to meet the burden of production.

The new rule provides that if the actor makes a claim under sub. (1) and the predicate facts apply, "the court . . . shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself." The Committee considered two issues relating to this provision: 1) whether the reference to "the court" refers to the judge alone, or whether it also applies to the jury; and, 2) what the effect is of requiring the court to employ the presumption. The Committee concluded that the reference to "the court" refers to the trial judge, not the jury, and that the effect of the presumption is to assist the defendant in meeting the burden of production that is required to make the privilege of self-defense [as defined in sub. (1) of § 939.48] an issue in the case.

• "The court" refers to the trial judge, not the jury.

In most situations, "the court" refers to the circuit court, that is, the judge, not the jury. See, for example, § 967.02(7), which provides [for the purposes of the Criminal Procedure

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Code]: "Court means the circuit court unless otherwise indicated." The Committee's conclusion that the reference is to the judge only and does not include the jury is consistent with the usual meaning given to "the court" and is faithful to the language of Act 94.

Act 94 had two parts: one relating to civil liability – § 895.62 – and one relating to the criminal law privilege of self-defense – § 939.48(1m). The civil and criminal provisions have roughly the same content, though they are not set up in exactly the same way. Section 895.62(3) is the civil equivalent of § 939.48(1m)(ar) and specifically refers to the "finder of fact":

> . . . the finder of fact may not consider whether the actor had an opportunity to flee or retreat before he or she used force and the actor is presumed to have reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself or herself or to another person.

The legislature used the term "finder of fact" in the civil provision, which clearly includes both the judge in a case without a jury and the jury. In the criminal provision that is part of the same act, the legislature used the term "court." Because Act 94 did not use "finder of fact" in the criminal provision, the Committee concluded that the reference to "the court" means the judge and does not include the jury.

• "The court shall presume" does not affect the state's burden of persuasion.

The usual effect of a "presumption" is to shift the burden of persuasion from one party to another. This is routinely done in civil cases. In criminal cases, the burden of persuasion is always on the state to prove all facts necessary to constitute the crime[4] and this burden cannot be shifted to the defendant by use of a "presumption."[5] With respect to the privilege of self-defense in Wisconsin, the burden is on the state to prove the privilege does not apply once the defendant meets the burden of production by showing "some evidence" of each aspect of the privilege.[6] The basic problem the Committee confronted is: how do you give defendants the benefit of a presumption as to a specific part of the case when a) they bear no burden of persuasion with respect to establishing that part of the case, and, b) they already enjoy a presumption of innocence as to all aspects of the case?

A defendant has a "presumption of innocence." This means the defendant must be found not guilty unless the state proves beyond a reasonable doubt both that all the facts necessary to constitute the crime have been established and that any defense raised by the evidence has been disproved. For example, as applied to a first degree intentional homicide case, the state must prove that the defendant caused death with intent to kill [the

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"elements" of the crime], and, if there is "some evidence" of the privilege of self-defense, that the defendant did not act lawfully in self-defense.[7]

Given the structure of the existing privilege of self-defense, and given that Act 94 did not change that privilege, the Committee concluded that creating a "presumption" about a part of the definition of self-defense [namely, that the defendant reasonably believed deadly force was necessary] does not add anything to what the state is already required to prove. The state already has burden to disprove the privilege of self-defense [once the burden of production is met] and that burden cannot be increased by any presumption the court might employ. Thus, the Committee concluded, Act 94 does not create any new, alternative standard for the jury to consider and there is no reason to communicate the substance of the new rule to the jury.

• "The court . . . shall presume" provides another way for the defendant to meet the burden of production.

The Committee concluded that the requirement that "the court shall presume" should be implemented by applying it to the defendant's obligation to meet the burden of production on the privilege of self-defense. The complete privilege of self-defense as defined in § 939.48(1) is to be submitted to the jury when there is "some evidence" of the privilege. In a case that does not involve the new rule, the defendant must point to evidence that he or she reasonably believed the following:

- that there was an actual and imminent unlawful interference with the defendant's person; and,
- that it was necessary to use force or threaten force to prevent or terminate the interference; and,
- when deadly force is used, that it was necessary to prevent imminent death or great bodily harm to himself or herself.

Once there is evidence tending to show these matters, the burden of persuasion is on the state to prove that the defendant's conduct did not meet the standard.[8]

The Committee concluded that under the new rule, the effect of "the court shall presume" is to provide the defendant with another way to meet the burden of production on self-defense. If there is evidence of the predicate facts under § 939.48(1m)(ar)1. or 2., the requirement that "the court shall presume" means that no additional evidence is required as to the issue of the defendant's reasonable belief that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

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Thus, under § 939.48 as amended by 2011 Wisconsin Act 94, there are two ways for a defendant to meet the burden of production on the privilege of self-defense:

- by pointing to some evidence of each part of the definition of self-defense in sub. (1) of § 939.48; or,
- by pointing to some evidence of the predicate facts set forth in sub. (1m)(ar)1. or 2., the provisions created by Act 94.

The determination whether the facts meet the "some evidence" threshold is for the trial court as is the case in other situations involving defenses or mitigating factors.

C. When a defendant asserts the privilege of self-defense under the new rule, the "some evidence" test is applied to the predicate facts.

This section details what is required when a defendant asserts the privilege of self-defense under the new rule set forth in sub. (1m). The trial court should review the evidence, including that produced by the state and by the defendant, to determine whether there is "some evidence" of the predicate facts recognized by the new rule. Specifically, the court must determine whether the evidence, when viewed most favorably to the defendant, shows three things:

1) that the person against whom the force was used

- was in the process of unlawfully and forcibly entering the the defendant's dwelling, motor vehicle, or place of business OR
- was in the the defendant's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; AND

2) that the defendant was present in the dwelling , motor vehicle, or place of business; AND

3) that the defendant knew or reasonably believed either that

- an unlawful and forcible entry was occurring OR
- the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The court must also determine that the evidence, when viewed most favorably to the defendant, shows that the exceptions to the new rule set forth in sub. (1m)(b) do not apply. Those exceptions are:

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• the defendant was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time;
• the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties AND the public safety worker identified himself or herself to the defendant before the force was used by the defendant OR the defendant knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

If the court finds that there is some evidence that the predicates for the new rule are present, and that the exceptions to the new rule do not apply, the privilege of self-defense should be presented to the jury.

D. When self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change.

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, nothing in the substance of the new rule need be communicated to the jury. The standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change.[9]

E. The state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction.

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, and because the standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change, the state can succeed in proving the privilege does not apply by proving that the defendant did not act lawfully in self-defense.[10] The state may do this by proving beyond a reasonable doubt that the defendant did not reasonably believe any of the following:

• that there was an actual and imminent unlawful interference with the defendant's person; or,
• that it was necessary to use force or threaten force to prevent or terminate the interference; or,

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• that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

F. When self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

Section 939.48(1m)(ar) also addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." The standard instruction that addresses retreat is Wis JI-Criminal 810. It provides that while "there is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference."

In a case where the new rule may apply, the court must not consider evidence relating to "whether the actor had an opportunity to flee or retreat" in making any decisions the court may be called upon to make regarding the privilege of self-defense. Further, as part of the court's obligation to instruct the jury on the law, the court should, upon request, instruct the jury as follows:

> There is no duty to retreat. You must not consider evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.

COMMENT

Wis JI-Criminal 805A Law Note was originally published in 2013. This revision was approved by the Committee in June 2019; it made minor revisions to the text and added footnote 2.

This Law Note explains the Committee's approach to the expanded privilege of self-defense set forth in § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.].

1. See §§ 776.013 and 776.032, Fla. Stats.

2. In State v. Chew, 2014 WI App 116, 358 Wis.2d 368, 856 N.W.2d 541, the court of appeals affirmed a trial court ruling that the evidence was not sufficient to raise the "Castle Doctrine." The court concluded that a shooting in a parking lot of an apartment complex did not occur in the "dwelling" – a factual predicate for the applicability of the new rule in § 939.48(1m).

3. While the new rule refers to the actor making "a claim under sub. (1)," and while the facts of a case may make it clear that self-defense will be an issue, under Wisconsin law a defendant does not have a general obligation to "claim" a defense in any formal way.

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4. The term "facts necessary to constitute the crime" is used to refer to those facts on which the state bears the burden of persuasion. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged . . ." These facts will always include the statutory elements of the crime and will include other facts on which the state bears the burden due to definitions of terms, exceptions recognized by the offense definition, defenses, and some penalty-increasing facts.

5. Mullaney v. Wilbur, 421 U.S. 684 (1974). "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." Patterson v. New York, 432 U.S. 197, 215 (1977). Also see, Sandstrom v. Montana, 442 U.S. 510 (1979).

6. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

7. A more complete statement of the "some evidence" standard is: when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

8. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

9. The free-standing instruction on self-defense involving deadly force is Wis JI-Criminal 805. The instructions for homicide offenses that incorporate instructions on self-defense are Wis JI-Criminal 1014, 1016, and 1017.

10. The standard instructions for intentional homicides involving the privilege of self-defense address both first and second degree intentional homicide and include instructions on the complete privilege and the mitigating circumstance of "unnecessary defensive force." Thus, the approach described above will not be presented to the jury in exactly that form. Absence of the mitigating circumstance is presented as part of the facts necessary to constitute first degree intentional homicide; absence of the complete privilege is presented as part of the facts necessary to constitute second degree intentional homicide. See Wis JI-Criminal 1014, 1016, and 1017.

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810 PRIVILEGE: SELF-DEFENSE: RETREAT

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE. DO NOT GIVE THIS INSTRUCTION IF § 939.48(1m) APPLIES. SEE WIS JI-CRIMINAL 805A.][1]

Retreat

[There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.].

COMMENT

Wis JI-Criminal 810 was originally published in 1966 and revised in 1993 and 1999. This revision updated the comment and was approved in June 2019; it added footnote 1 and the directions immediately preceding it.

This instruction reflects the rule that a person generally has no duty to retreat before acting in self-defense. A duty to retreat does exist where the person provokes the attack. See Wis JI-Criminal 815.

The Committee concluded that while reference to "duty to retreat" is arguably unnecessary given the potential relevance of retreat to the reasonable use of force, it was advisable to continue to publish Wis JI-Criminal 810. It is intended to be "optional" in the sense that it is to be used only when the trial judge concludes that "retreat" is an important issue in the case and that the jury's understanding will be aided by a statement of the rather general legal standard that applies. It is drafted to apply to both deadly and nondeadly force cases.

The description of law provided in this instruction was cited with apparent approval in State v. Wenger, 225 Wis.2d 495, 502-03, 593 N.W.2d 467 (Ct. App. 1999).

The reference to "duty" to retreat is to a flat rule of the common law making the privilege of self-defense unavailable to one who did not exhaust all means of avoiding physical confrontation. Thus, a factfinder would not be allowed to consider self-defense and a defendant would not be allowed to introduce evidence relating to self-defense unless there was a showing that the duty to retreat was fulfilled.

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It appears that the common law duty to retreat distinguished between nondeadly and deadly force cases. The LaFave and Scott treatise states that "it is everywhere agreed that one who can safely retreat need not do so before using nondeadly force." Substantive Criminal Law, § 5.7(f), at 659.

The basis for making a distinction appeared to be a balancing of the interests involved. The actor's interest in staying where he or she has a right to be and in not compromising his or her self-respect by engaging in cowardly conduct was seen as sufficient to outweigh the interest in not causing bodily harm to the aggressor. But the actor's interests in self-respect were not seen as sufficient to outweigh the causing of death or serious bodily harm to the aggressor. A classic law review article on retreat describes this balancing in the following terms:

> A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would always regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow being on his hands.

Beale, "Retreat From Murderous Assault," 16 Harv. L. Rev. 567, 581 (1903).

As to retreat in deadly force cases, LaFave and Scott describe two views. The majority view is that there is no duty to retreat before using deadly force unless the actor is the original aggressor. It appears that Wisconsin adopted this view in the Miller case, discussed below. The minority view imposed a duty to retreat "to the wall" if the actor could do so with safety and knew of the chance to do so.

But even the minority view recognized exceptions to this duty, the leading one being that a person need not retreat in his own home: there is no safer place to which the person can retreat. Some courts recognized the same rule as applying to the place of business.

To summarize the common law rule: "Duty" in "duty to retreat" referred to a flat rule precluding reliance on self-defense in cases where the person did not retreat as required. There was no duty to retreat in nondeadly force cases. There was a split in authority in deadly force cases, but even where retreat was required in deadly force cases, it did not apply where the actor was in his own home and did not provoke the attack.

The common law rule's development and rejection is discussed in three dated but interesting decisions of the United States Supreme Court. See Beard v. United States, 158 U.S. 550 (1895), Rowe v. United States, 164 U.S. 546 (1896), and Brown v. United States, 256 U.S. 335 (1921). Each decision reversed a federal conviction for manslaughter on the basis of jury instructions that incorrectly imposed a duty to retreat on the defendant.

There are relatively few Wisconsin cases on this topic. The leading case, Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909), precedes the 1955 Criminal Code revision, when the current definition of the privilege of self-defense was adopted.

Miller involved a killing that followed a drunken argument at Bromley's house. Miller, Bromley's housekeeper, was charged as a conspirator. The victim and two other men were ordered to leave Bromley's house and, after some scuffling, they did. The victim returned a short time later, asking for his coat and hat. Bromley shot him in the chest with a rifle and killed him. Bromley was standing at his front door at the time; the victim was a short distance away in the yard.

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Many errors were argued on appeal. With respect to Bromley's claim of self-defense, the Wisconsin Supreme Court found that the jury was improperly instructed. One of the errors was the requirement that the defendant should have retreated if the incident occurred outside his house. The court rejected this as "offend[ing] against the long-established law of this state."

> The ancient doctrine requiring the party assaulted to "retreat to the wall," . . . may have been all right in the days of chivalry, so called, but, by almost common consent of the moulders of the unwritten law, in later years, it is unadaptable to our modern development and, therefore, has been pretty generally, and in this state very definitely, abandoned. It has been superseded by a doctrine in harmony with the divine right of self-defense; the doctrine that when one is where he has a right to be and does not create the danger by his own wrongful conduct, he may stand his ground. . . .

139 Wis. 57, 75.

The error was found to be harmless, however, since the court found that there was no evidence to support the defendant's claim that he reasonably believed it was necessary to use deadly force when the victim returned, unarmed, to the house to ask for his hat.

State v. Kelley, 107 Wis.2d 540, 319 N.W.2d 869 (1982), considers retreat only in passing. A fight erupted at the home of Kelley's friends. Kelley went to the home and was told that Lowery was in the house and had a gun. Kelley went into the house. Lowery fired a shot at him, hitting Kelley in the right hand and wounding another man, Burgess. Kelley continued up the stairs in pursuit of Lowery and was shot by Lowery again, this time in the left hand. Lowery ran into a bedroom and closed the door. Kelley fired three shots through the door, killing Lowery.

Kelley appealed his conviction for manslaughter, claiming that the evidence showed his conduct was completely privileged. The Wisconsin Supreme Court upheld the conviction, finding the evidence sufficient to show that a reasonable person would not have believed himself to be in imminent danger after Lowery went into the bedroom. Further, the court found that the evidence was sufficient to show that the amount of force used was excessive.

The reference to retreat came in the context of analyzing the sufficiency of the evidence:

> After the defendant had been shot, Lowery disappeared into a bedroom. There was nothing at this point which prevented the defendant from retreating to the first floor rather than proceeding to the second floor. Furthermore, Lowery's disappearance, along with the fact that defendant had received two relatively minor wounds, is sufficient evidence upon which a jury could find that a reasonable person would not have believed himself to be in 'imminent danger. . . .'

107 Wis.2d 540, 548.

State v. Herriges, 155 Wis.2d 279, 119 N.W.2d 850 (Ct. App. 1990), involved a person who physically resisted police when they attempted to arrest him in his home. He was charged with battery; only nondeadly force was involved. The trial court instructed on self-defense, including the rule that a person who provokes the attack must retreat to regain the privilege.

The appellate court upheld the instructions given, holding that the provocation rule applied even though the person was in his home:

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> . . . . The home provides a haven, not an arena. 'One assaulted in his house need not flee therefrom. But his house is his castle only for the purposes of defense. It cannot be turned into an arsenal for the purpose of offensive effort against the lives of others. It is a shelter, but not a sally port.' Raines v. State, 455 So.2d 967, 972 (Ala. Crim. App. 1984). We therefore follow the direction given by our supreme court in Miller and adopt the rule that if there has been provocation by the one assaulted, even if that provocation occurs in the home, successful assertion of self-defense requires a reasonable belief that one cannot retreat before force likely to cause death or great bodily harm may be used.

155 Wis.2d 297, 304-05.

By implication, the court approved the rule that aside from the provocation situation, there is no duty to retreat in the home, or anywhere else.

When the privilege of self-defense was codified in the 1956 revision of the Criminal Code, the duty to retreat was recognized only where the person provoked the attack; such a person must "exhaust every other reasonable means to escape" before resorting to deadly force. Subsection 939.48(2)(a). In all other situations, the feasibility of retreat is to be considered along with all the other circumstances, in deciding whether the person reasonably believed the use of force was necessary in self-defense. The Comment to the 1953 Draft of the revised criminal code provides:

> Under this section, the feasibility of retreat from the assailant, with one exception, is handled as an aspect of the question of whether the actor reasonably believed the force used was necessary to prevent or terminate the interference. The exception is the case where the actor himself provoked the attack. In such a case, it is desirable to emphasize the fact that the actor should do everything reasonably possible to escape from the attack before he resorts to the use of deadly force.

Comment to § 339.48(2), 1953 Report on the Criminal Code (Wisconsin Legislative Council, 1953).

Wis JI-Criminal 810 implements the standard set forth in the first sentence of the above comment.

1. Section 939.48(1m) relates to what is commonly termed the "Castle Doctrine." [Note: the Committee recommends that caution should be used in relying on that term to describe the provision. While it is a convenient term, the substance of the "Castle Doctrine" varies state by state; Wisconsin's version is more limited than that of Florida, for example. This footnote uses the term "the new rule."] Section 939.48(1m) was created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.] The Committee's interpretation of the provision is explained in Wis JI-Criminal 805A Law Note: Self-Defense Under § 939.48(1m).

When self-defense is presented to the jury in a case where the new rule applies, JI-810 should not be given. Section 939.48(1m)(ar) addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." JI-810's statement that while "there is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference" runs counter to sub. (1m)(ar)'s command that "the court may not consider whether the actor had an opportunity to flee or retreat ..."

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In addition, the court should, upon request, instruct the jury as follows:

There is no duty to retreat. You must not consider evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.

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815 PRIVILEGE: SELF-DEFENSE: NOT AVAILABLE TO ONE WHO PROVOKES AN ATTACK: REGAINING THE PRIVILEGE – § 939.48(2)

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE.]

Provocation

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct[1] of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

[USE ANY OF THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.]

[However, if the attack which follows causes the person reasonably to believe that he[2] is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.]

[A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense.]

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COMMENT

Wis JI-Criminal 815 was originally published in 1962 and revised in 1994. This revision updated the comment and was approved in August 1999.

The 1962 version of Wis JI-Criminal 815 was cited as a correct statement of the law in State v. Walker, 99 Wis.2d 687, 695-96, 299 N.W.2d 861 (1981). It was reviewed again in State v. Herriges, 155 Wis.2d 297, 455 N.W.2d 635 (Ct. App. 1990). The court held that a person who provokes an attack must retreat in order to regain the privilege of self-defense, even if that person is in his own home:

> . . . . The home provides a haven, not an arena. "One assaulted in his house need not flee therefrom. But his house is his castle only for the purposes of defense. It cannot be turned into an arsenal for the purposes of offensive effort against the lives of others. It is a shelter, but not a sally-port." Raines v. State, 445 So.2d 967, 972 (Ala. Crim. App. 1984). We therefore follow the direction given by our supreme court in Miller and adopt the rule that if there has been provocation by the one assaulted, even if that provocation occurs in the home, successful assertion of self-defense requires a reasonable belief that one cannot retreat before force likely to cause death or great bodily harm may be used.

155 Wis.2d 297, 304-05.

The "duty to retreat" is extensively discussed in Wis JI-Criminal 810.

1. The first paragraph of the instruction reflects the rule stated in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. In State v. Boughneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 would constitute "unlawful conduct" for the purposes of § 939.48(2).

2. This instruction uses "he" to refer to the "person" serving as the general standard against which the defendant's conduct is being measured. The Committee attempts to avoid using the masculine form of the pronoun in these situations. See Wis JI-Criminal 5, Comment: Gender Neutral Language. In this case, attempts to rewrite the instruction to avoid use of the pronoun were unsuccessful; they made an already complicated statement too difficult to understand. If the case involves a female defendant, the Committee recommends changing the pronoun in this paragraph to "she."

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820 PRIVILEGE: SELF-DEFENSE: INJURY TO THIRD PARTY CHARGED AS RECKLESS OR NEGLIGENT CRIME — § 939.48(3)

INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS OF THE CRIME ARE DEFINED.

Self-Defense As To (Name Person)

There is evidence in this case that the defendant was acting in self-defense as to (name person).[1]

The fact that the law may allow the defendant to use force in self-defense as to (name person) does not necessarily mean that the causing of harm to (name victim)[2] was lawful. You must consider the law of self-defense in deciding whether the defendant's conduct as to (name victim) [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct], but the defendant does not have a privilege of self-defense as to (name victim).

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,

- the defendant believed that the amount of force (he) (she) used or threatened to use was necessary to prevent or terminate the interference; and,

- the defendant's beliefs were reasonable.

ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.

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[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now.

IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.

IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.

FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:

You should consider the evidence relating to self-defense along with all the other evidence in the case in deciding whether the defendant's conduct created an unreasonable risk of death or great bodily harm to (name victim). If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on

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the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[3]

FOR FIRST DEGREE RECKLESS OFFENSES ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD" ELEMENT:

[You should consider the evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.][4]

CONCLUDE WITH THE CONCLUDING PARAGRAPHS FROM THE INSTRUCTION FOR THE OFFENSE CHARGED.

COMMENT

Wis JI-Criminal 820 was originally published in 1962 and revised in 1994 and 2006. This revision was approved by the Committee in December 2017.

This instruction is intended to implement § 939.48(3), which provides as follows:

> (3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

The original version of Wis JI-Criminal 820 paraphrased the statute, explaining that the privilege of self-defense extended to the unintended infliction of harm to a third party, unless that infliction amounted to a crime involving what was formerly called "conduct regardless of life," reckless conduct, or criminal negligence.

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The 2006 revision modified that approach, based on the assumption that the issue will arise in the context of a charge based on causing harm to the third party by criminally reckless or criminally negligent conduct. In that context, the Committee concluded that the preferred approach is to relate the defendant's exercise of the privilege to the establishment of the elements of the recklessness-based or negligence-based crime. Thus, the substance of this instruction is borrowed from Wis JI-Criminal 801, Privilege: Self-Defense: Force Less Than That Likely To Cause Death Or Great Bodily Harm: Crimes Involving Recklessness or Negligence.

For example, assume that a defendant is charged with causing reckless injury to the victim, and raises the defense that he was acting in self-defense against someone else and thereby injured the victim. Criminal recklessness requires that the defendant's conduct created "an unreasonable and substantial risk of death or great bodily harm." [See § 939.24.] In considering whether the risk was "unreasonable," the jury should consider the evidence that the defendant was acting in self-defense. [See Wis JI-Criminal 801.]

It is possible that a case could involve a charge based on intentional harm to the third person – as under a statute such as § 940.19(1), simple battery, which applies to causing bodily harm with intent to cause harm to that person or another. In such a case, conduct that is privileged as to its intended target is also privileged as to the unintended third person who is injured. Such harm is "unintended" as that term is used in § 939.48(3), but it is "intentional" under the substantive statutes that define crimes in terms of intending to harm "that person or another." For that case, see Wis JI-Criminal 821, which provides that to establish the crime against the unintended victim, the state must prove beyond a reasonable doubt that the defendant was not privileged in the use of force against the intended target of that force.

1. Here, use the name of the person against whom the defendant intended to use force in self-defense.

2. Insert the name of the injured party, who is the victim of the crime charged.

3. The last two sentences of this paragraph were added in 2018 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The same deficiency appeared in this instruction. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

4. The last two sentences of this paragraph were added in 2018 in response to the decision in State v. Austin, see note 3, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.

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821 PRIVILEGE: SELF-DEFENSE: UNINTENDED HARM TO THIRD PARTY CHARGED AS INTENTIONAL CRIME – § 939.48(3)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

Self Defense

There is evidence in this case that the defendant was acting in self-defense as to (name of person).[1] If the defendant was privileged to use force in self-defense against (name of person), that privilege extended to harm caused to [(name of victim)[2]].

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference[3] with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

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Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[4] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[5] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements _____[6] have been proved [as to the harm caused to (name of victim)] and that the defendant did not act lawfully in self-defense as to (name of person) , you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 821 was approved by the Committee in December 2017.

This instruction is intended to implement § 939.48(3), which provides as follows:

> (3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

The Committee concluded that two types of cases can arise in which this statute could apply. First, the defendant may be charged with a negligent or reckless crime committed against the third person. For that type of case, see Wis JI-Criminal 820. Second, the defendant may be charged with intentionally causing harm to the third person under a statute that defines an offense as acting with intent to cause harm "to that person or another" or where there is a dispute about whether self-defense applies at all. This instruction is intended for use in that type of case and adapts the wording of Wis JI-Criminal 800 to these circumstances.

For an example where this instruction may be used, consider the crime of simple battery as defined in § 940.19(1): "Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor." A defendant could be charged with committing a battery against the victim by an act done with intent to cause bodily harm to another person – a person as to whom the defendant claims the right to use force in self-defense. If the defendant is lawfully acting in self-defense as to the other person, the privilege extends to "the infliction of unintended harm" upon the victim of the charge offense. That harm is "unintended" as the term is used in § 939.48(3), but is "intentional" under § 940.19(1) which defines the crime as requiring "intent to cause bodily harm to that person or another."

1. Here, use the name of the person against whom the defendant intended to use force in self-defense.

2. Insert the name of the injured party, who is the victim of the crime charged.

3. For purposes of self-defense, "unlawful" means "either tortious or expressly prohibited by criminal law or both." Section 939.48(6). Further instruction on what constitutes "unlawful interference" in the context of the facts of a particular case may be desirable. See footnote 1, Wis JI-Criminal 800 for additional discussion.

4. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

5. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975). See footnote 3, Wis JI-Criminal 800 for additional discussion.

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6. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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825 PRIVILEGE: DEFENSE OF OTHERS: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48(4)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

Defense of Others

Defense of others is an issue in this case. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person); and,
- the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person); and,
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

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[IF THERE IS EVIDENCE THAT THE THIRD PERSON PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 835].

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[1] have been proved and that the defendant did not act lawfully in defense of others, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 825 was originally published in 1966 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1994 revision of this instruction changed its format to allow integrating the description of defense of others with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

This instruction is for cases where less than deadly force is involved. For deadly force cases, see Wis JI-Criminal 830.

1. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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830 PRIVILEGE: DEFENSE OF OTHERS: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48(4)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

Defense of Others

Defense of others is an issue in this case. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person); and,
- the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person); and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (name of third person).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable, even though mistaken. In determining whether the defendant's beliefs were reasonable the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must

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be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE THIRD PERSON PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 835].

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[1] have been proved and that the defendant did not act lawfully in defense of others, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 830 was originally published in 1966 and revised in 1989 and 1994. This revision was approved by the Committee in April 2005.

This instruction deals with the privilege to use or threaten the use of "deadly force" in the defense of a third person. See § 939.48(4).

The 1994 revision of this instruction changed the format to allow integrating the description of defense of others with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

This instruction was revised in 1988 in response to State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988). Ambuehl held that the 1966 version of Wis JI-Criminal 830 was in error because it referred

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only to "use of force" and did not mention the other alternative, "threat of force." The 1994 revision includes reference to "use" and "threat of use" of force throughout.

The facts in Ambuehl illustrate why the omission of "threat of force" may be a problem. Ambuehl was charged with attempted murder and injury by conduct regardless of life. The charges arose from a barroom fight during which a gun Ambuehl was holding went off, injuring one of the combatants. Ambuehl claimed she intentionally pointed the gun at the man who was fighting with her friend, and the gun went off accidentally. Thus, she claimed she intentionally threatened force but did not intentionally use force—the actual use was accidental. In this situation, the court of appeals found that the instruction's failure to include reference to the threat of force alternative "was likely to divert the jury from Ambuehl's version of the shooting to a version which she denied had occurred." 145 Wis.2d 343, 373. This resulted in the real controversy not being tried and required reversal, even though the instruction had not been objected to.

1. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: "... that all four elements of battery have been proved ..." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, ..." See Wis JI-Criminal 1222A.

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835 PRIVILEGE: DEFENSE OF OTHERS: EFFECT OF PROVOCATION BY PERSON DEFENDED — § 939.48(4)

ADD THE FOLLOWING TO WIS JI-CRIMINAL 825 OR 830 WHEN SUPPORTED BY THE EVIDENCE.

Provocation

You should consider whether (name of person defended) provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

[USE ANY OF THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.]

[However, if the attack which follows causes the person reasonably to believe that he[1] is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.]

[A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense.]

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However, even if (name of person defended) had provoked the attack, the defendant would still be allowed to act in defense of (name of person defended) if the defendant actually and reasonably believed that (name of person defended) was entitled to act in his or her own defense.

COMMENT

Wis JI-Criminal 835 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005.

This instruction is intended for use with Wis JI-Criminal 825 or 830, if applicable.

1. This instruction uses "he" to refer to the "person" serving as the general standard against which the defendant's conduct is being measured. The Committee attempts to avoid using the masculine form of the pronoun in these situations. See Wis JI-Criminal 5, Comment: Gender Neutral Language. In this case, attempts to rewrite the instruction to avoid use of the pronoun were unsuccessful; they made an already complicated statement too difficult to understand. If the case involves a female defendant, the Committee recommends changing the pronoun in this paragraph to "she."

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855 PRIVILEGE: DEFENSE OF ONE'S PROPERTY — § 939.49(1)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

Defense of Property

Defense of property is an issue in this case. The law of defense of property allows the defendant to threaten or intentionally use force to defend (his) (her) property only if:

- the defendant believed that (name of victim) was unlawfully interfering with the defendant's property; and,
- the defendant believed that the amount of force the defendant used or threatened was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

The law of defense of property does not allow a person to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.[1]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

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State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in defense of property.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[2] have been proved and that the defendant did not act lawfully in defense of property, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 855 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1994 revision of this instruction changed the format to allow integrating the description of defense of property with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

1. This statement is a slight change from the text of § 939.49, which is phrased: "it is not reasonable." No change in substance is intended. What is being expressed is a flat rule that "it is not permissible to use deadly force for the sole purpose of protecting property." Comment to § 339.49, 1953 Judiciary Committee Report on the Criminal Code, p. 48.

2. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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860 PRIVILEGE: DEFENSE OF ANOTHER'S PROPERTY — § 939.49(2)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

Defense of Another's Property

Defense of the property of another is an issue in this case. The law of defense of property allows the defendant to threaten or intentionally use force to defend the property of another only if:

- the defendant believed that there was an unlawful interference with the property of (name of third person); and,
- the defendant believed that the property belonged to (a member of the defendant's immediate family or household) (a person whose property the defendant has a legal duty to protect) (a merchant who employs the defendant) (a library that employs the defendant); and,
- the defendant believed that (name of third person) was entitled to use or threaten to use force to defend his property; and,
- the defendant believed that the amount of force used or threatened was necessary for the protection of (name of third person)'s property; and,
- the defendant's beliefs were reasonable.

The law of defense of property does not allow a person to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of property.[1]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would

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have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in defense of the property of another

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[2] have been proved and that the defendant did not act lawfully in defense of property of another, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 860 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1994 revision of this instruction changed the format to allow integrating the description of defense of property with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.

1. This statement is a slight change from the text of § 939.49, which is phrased: "it is not reasonable." No change in substance is intended. What is being expressed is a flat rule that "it is not permissible to use deadly force for the sole purpose of protecting property." Comment to § 339.49, 1953 Judiciary Committee Report on the Criminal Code, p. 48.

2. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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870 PRIVILEGE: CONDUCT IN GOOD FAITH AND IN AN APPARENTLY AUTHORIZED AND REASONABLE FULFILLMENT OF DUTIES OF A PUBLIC OFFICE — § 939.45(3)

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

Privilege Of A Public Office

The privilege of fulfillment of the duties of a public office is an issue in this case. The law provides that a person is privileged to engage in conduct that would otherwise be criminal if:

- First, the defendant acted in good faith.

"Good faith" means that the defendant believed that (his) (her) conduct was an authorized and reasonable fulfillment of (his) (her) duties as a (specify the public office).[1]

- Second, the defendant's conduct was an apparently authorized and reasonable fulfillment of the duties of a public office.

  The duties of a (specify the public office) include: (specify duties).[2]

"Apparently authorized" means that a reasonable person would believe that the defendant had the authority to act in the manner (he) (she) did.

"Reasonable fulfillment" of duties means that the defendant's conduct was necessary and proportional in responding to the interests at stake.[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully within the scope of the privilege of a public office.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of _____[4] have been proved and that the defendant did not act lawfully within the scope of the privilege of fulfillment of the duties of a public office, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 870 was approved by the Committee in April 2014.

This instruction is drafted for the privilege set forth in § 939.45(3).

The privilege has been discussed in two published appellate decisions. State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986) involved a district director for a state technical institute charged with violating § 946.13(1)(b), private interest in a public contract. State v. Trentadue, 180 Wis.2d 670, 510 N.W.2d 727 (Ct. App. 1993), involved a police officer charged with violating § 941.20(1)(c), intentionally pointing a firearm at or toward another.

1. The Committee concluded that the standard for "good faith" was a subjective one — the focus should be on whether the defendant actually believed that what he or she was doing was an authorized and reasonable fulfillment of the duties of his or her office.

2. The duties of some public offices are set forth in the Wisconsin Statutes or Administrative Code or may be established by reference to other legal standards. When that is the case, the Committee suggests using the sentence in parentheses and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

3. This is based on the following from the Wisconsin Supreme Court decision in State v. Stoehr, 134 Wis.2d 66, 86, 396 N.W.2d 177 (1986):

> The statutory privilege defense is designed to provide a justification for conduct which "must be in accord with the actor's function as a public servant, and must be necessary and proportional to the protection and furtherance of the interests at stake." 2 Robinson,*Criminal Law Defenses*, sec. 149(a), p. 216 (1984).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under

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§ 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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880 PRIVILEGE TO USE FORCE: REASONABLE ACCOMPLISHMENT OF A LAWFUL ARREST BY A PEACE OFFICER: NONDEADLY FORCE

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

Use of Force by Peace Officer

The use of force by a peace officer[1] is an issue in this case. The law allows a peace officer to use force in making a lawful arrest[2] only if:

- the defendant believed that it was necessary to use force to make an arrest; and,
- the defendant believed that the amount of force used was necessary to secure and detain the person arrested, to overcome any resistance, to prevent escape, or to protect the defendant from bodily harm; and,
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what an ordinary, prudent, and reasonably intelligent officer would have believed in the defendant's position, having the knowledge and training that the defendant possessed, and acting under the circumstances that existed at the time of the alleged offense.[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in the use of force to make an arrest.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[4] have been proved and that the defendant did not act lawfully in using force to make an arrest, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 880 was originally published in 1974 and revised in 1987 and 1994. This revision was approved by the Committee in April 2005.

The 1987 and 1994 revisions of this instruction changed its format to allow integrating the description of the privilege to use force with the instruction on the crime charged. See the Comment to Wis JI-Criminal 800.

Wis JI-Criminal 880 addresses the privilege to use nondeadly force in making an arrest. Wis JI-Criminal 885 addresses the use of deadly force. The privilege to use force to make a lawful arrest is recognized in broad terms in § 939.45(4). It is not specifically limited to peace officers, though this instruction is. Police may also be privileged to use force in self-defense or in defense of others, situations that are not covered by this instruction. See Wis. Stat. § 939.48 and Wis JI-Criminal 800 through 835.

1. "Peace officer" is defined as follows in § 939.22(22):

> "Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

2. With regard to whether the arrest was lawful, footnote 1 to the 1974 version of this instruction provided as follows:

> 1. An element of this defense is that the arrest is lawful (defined Wis. Stat. § 968.07 (1971)), that is, that the arrest was made pursuant to a warrant or if made without a warrant, there was probable cause for the arrest. The question for arrest, without a warrant, based upon probable cause, is a mixed question of law and fact. If there is no dispute as to the facts of the arrest, then it is up to the court to decide if they show probable cause for arrest. If the facts are in dispute, the court should instruct the jury as to what facts will constitute probable cause, and submit to them only the question of the existence of those facts. 5 Am. Jur.2d Arrest § 49, p. 741 (1962). An arrest made pursuant to a warrant valid in form and issued by a court of competent jurisdiction is considered lawful as to the arresting officer. 5 Am. Jur.2d Arrest § 4, p. 698 (1962). Validity of the warrant then is a matter for the court to decide. It is suggested that the lawfulness of the arrest, if it is a

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matter for merely the court to decide, should be decided first because if the arrest is found to be unlawful, the defense would be unavailable to the defendant and therefore no longer an issue for the jury to decide.

3. The 1986 and 1994 revisions substantially shortened the text of the instruction. No case law or other developments required the change. The intent was to simplify and clarify the instruction.

The Committee is aware of no reported criminal cases dealing with the privilege of a peace officer to use force in making an arrest. The following are some of the civil cases that discuss the issue: McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1969); Celmer v. Quarberg, 56 Wis.2d 581, 203 N.W.2d 45 (1973); and Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Also see Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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885 PRIVILEGE TO USE FORCE: REASONABLE ACCOMPLISHMENT OF A LAWFUL ARREST BY A PEACE OFFICER: DEADLY FORCE

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

Use of Force by Peace Officer

The use of force by a peace officer[1] is an issue in this case. The law allows a peace officer to use force in making a lawful arrest[2] only if:

- the defendant believed that it was necessary to use force to make an arrest; and,
- the defendant believed that the amount of force used was necessary to secure and detain the person arrested, to overcome any resistance, to prevent escape, or to protect himself from bodily harm; and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm in making a lawful arrest only if (he) (she) believed that such force was necessary to prevent the escape of (name of victim) and believed that (name of victim) posed a significant threat of death or serious physical injury to the defendant or others.[3]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what an ordinary, prudent, and reasonably intelligent officer would have believed in the defendant's position, having the knowledge and training that the defendant possessed, and acting under the circumstances that existed at the time of the alleged offense.[4]

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State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in the use of force to make an arrest.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of _____[5] have been proved and that the defendant did not act lawfully in using force to make an arrest, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 885 was originally published in 1987 and revised in 1994. This revision was approved by the Committee in April 2005.

The 1987 and 1994 revisions of this instruction changed its format to allow integrating the description of the privilege to use force with the instruction on the crime charged. See the Comment to Wis JI-Criminal 800.

Wis JI-Criminal 885 attempts to explain the limits on the use of deadly force by peace officers in making a lawful arrest. The privilege to use force to make a lawful arrest is recognized in broad terms by § 939.45(4). It is not specifically limited to peace officers, though this instruction is. Peace officers may also be privileged to use force in self-defense or defense of others, situations that are beyond the scope of this instruction. See Wis. Stat. § 939.48 and Wis JI-Criminal 800 through 835.

1. "Peace officer" is defined as follows in § 939.22(22):

> "Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

2. With regard to whether the arrest was lawful, footnote 1 to the 1974 version of this instruction provided as follows:

> 1. An element of this defense is that the arrest is lawful (defined Wis. Stat. § 968.07 (1971)), that is, that the arrest was made pursuant to a warrant or if made without a warrant, there was probable cause for the arrest. The question for arrest, without a warrant, based upon probable cause, is a

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mixed question of law and fact. If there is no dispute as to the facts of the arrest, then it is up to the court to decide if they show probable cause for arrest. If the facts are in dispute, the court should instruct the jury as to what facts will constitute probable cause, and submit to them only the question of the existence of those facts. 5 Am. Jur.2d Arrest § 49, p. 741 (1962). An arrest made pursuant to a warrant valid in form and issued by a court of competent jurisdiction is considered lawful as to the arresting officer. 5 Am. Jur.2d Arrest § 4, p. 698 (1962). Validity of the warrant then is a matter for the court to decide. It is suggested that the lawfulness of the arrest, if it is a matter for merely the court to decide, should be decided first because if the arrest is found to be unlawful, the defense would be unavailable to the defendant and therefore no longer an issue for the jury to decide.

3. The standard for the use of deadly force is based on the decision of the United States Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Garner held that deadly force may not be used to accomplish an arrest "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. 1, 3.

The Garner decision is based on the Fourth Amendment's rule against unreasonable seizures: "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. 1, 7. Thus, Garner does not articulate principles of substantive criminal law. However, the Committee concluded that it was instructive in setting forth the two requirements for the valid use of deadly force which are adopted in the instruction.

It is not clear whether Wisconsin had continued to follow the common law "fleeing felon rule" that Garner invalidated. (The fleeing felon rule being that deadly force could be used to accomplish any felony arrest.) In Garner, the Court assumed that Wisconsin did continue to follow the rule. See footnote 14 at 471 U.S. 1, 16. Also see the discussion in Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975). After Garner, it is obvious that Wisconsin must adopt a rule consistent with that decision.

4. The 1987 revision substantially shortened the text of the instruction. No case law or other developments required the change. The intent was to simplify and clarify the instruction.

The Committee is aware of no reported criminal cases dealing with the privilege of a peace officer to use force in making an arrest. The following are some of the civil cases that discuss the issue: McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1969); Celmer v. Quarberg, 56 Wis.2d 581, 203 N.W.2d 45 (1973); and Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Also see Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975).

5. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: "... that all four elements of battery have been proved ..." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense" instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, ..." See Wis JI-Criminal 1222A.

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901 CAUSE

The _____ element requires that the defendant caused (identify harm or consequence) to (name of victim). "Cause" means that the defendant's conduct was a substantial factor in producing (identify harm or consequence).

FOR CASES WHERE THERE IS EVIDENCE OF MORE THAN ONE CAUSE, ADD THE FOLLOWING:

[There may be more than one cause of (identify harm or consequence). The act of one person alone might produce it, or the acts of two more persons might jointly produce it.]

COMMENT

Wis JI-Criminal 901 was originally published in 1996 and the Comment was updated in 2004. This revision revised the Comment and was approved by the Committee in December 2016.

This instruction is intended to provide a basic definition of "cause." Its substance is incorporated into most instructions for substantive offenses. That typically involves a relatively brief statement, which may be inadequate in a case where a contested or difficult cause issue is presented. The material provided here may be helpful for the preparation of a more detailed cause instruction in those cases.

Cause In Wisconsin: "Substantial Factor"

Wisconsin has no statutory definition of cause; through case law it has adopted the "substantial factor" test. The same standard is used in civil cases – see Wis JI-Civil 1500 and 1505.

Even the comprehensive Wisconsin Criminal Code Revision in the 1950s did not define "cause." But the state of the law at the time was summarized in the commentary to a general section on homicide – sec. 340.01 of the 1950 draft – that was not enacted:

> *Causation:* In criminal law, as in torts, the term causation is used to refer to 2 quite different problems: (a) Did the actor's act in fact cause the consequences, and, (b) assuming that it did, is there any reason based on policy considerations for limiting liability?
>
> Whether the actor's act did in fact cause the prescribed consequence is, in the ordinary case, not difficult to determine. The state has the burden of proving this element to the jury. The "substantial factor" test currently in use in tort litigation works equally well in criminal law.

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> Whether there is any reason based on policy considerations for limiting liability may be more difficult to determine. Part of this difficulty is attributable to the fact that the problem is often treated as one of causation rather than one of limiting liability based on policy considerations present in the particular case. . .
> **Wisconsin Legislative Council 1950 Report Vol. VII – Judiciary – Part III**
> **April 1951, p. 50**

For a case finding the evidence insufficient to prove that a defendant's conduct caused death, see State v. Serebin, 119 Wis. 2d 837, 350 N.W.2d 65 (1984).

In State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, the court held that the "substantial factor" test was met as to reckless homicide and physical abuse of a child and affirmed the trial court's refusal to give an instruction on "intervening cause."

A recent decision of the U.S. Supreme Court relating to cause should not affect Wisconsin law. Burrage v. United States, 571 U.S. ___, 134 S.Ct. 881 (2014), interpreted a federal statute – 21 USC § 844(a)(1), (b)(1)A-C – which provides for a 20-year mandatory minimum sentence where death or great bodily harm results from the use of a controlled substance. The Court held that "results from" means "actual cause" and that "actual cause" means that the harm would not have occurred but-for the defendant's conduct. The Court rejected the government's argument [a position also adopted by several federal circuits] that it was sufficient if the defendant's conduct was a "contributing cause" of the harm. In rejecting that argument, the court referred to [but did not necessarily accept] the government's characterization that "contributing cause" and "substantial factor" cause were the same thing. That reference should have no impact on Wisconsin law because Burrage is a decision interpreting a federal criminal statute and is not binding in Wisconsin. Further, the Wisconsin "substantial factor" test requires "actual" or "physical" cause [and thus would satisfy the concerns addressed in Burrage if that decision did apply].

Intervening Medical Treatment

The issue of intervening medical treatment and cause of death was discussed in State v. Block, 170 Wis.2d 676, 489 N.W.2d 715 (Ct. App. 1992). Block was convicted of second degree murder in connection with the death of his 73-year-old grandmother, whom he stabbed on October 5, 1987. Between the day of the stabbing and the day of death on December 24, 1987, the victim was hospitalized three times and underwent three operations. She died from a pulmonary embolism. The treating physicians testified that the stabbing was a substantial factor in causing her death.

Block claimed that negligence by the treating physicians caused the death. Over Block's objection, the trial court instructed the jury as follows:

> In Wisconsin, if the defendant inflicts a wound of potentially mortal or life threatening nature on another and negligence, if any, of the doctor contributes to the victim's death, such negligence does not break the chain of causation between the acts of the defendant and the subsequent death. The State is only required to prove beyond a reasonable doubt that the defendant's acts were a substantial factor in producing the death.

The court of appeals held that the instruction was warranted by the evidence and also accurately stated the law:

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> . . . any medical negligence in connection with procedures undertaken in response to a life-threatening situation created by the defendant does "not break the chain of causation" even though that negligence may have "contributed" to the victim's death.

170 Wis.2d 676, 682, citing Cranmore v. State, 85 Wis.2d 722, 271 N.W.2d 402 (Ct. App. 1978).

Also see, State v. Below, 2011 WI App 64, 333 Wis. 2d 690, 799 N.W.2d 95, which involved the termination of life support measures for a child victim injured by the defendant's actions.

"As a Result" Means "Cause"

Some criminal statutes, primarily outside the Criminal Code, use a phrase like "as a result" or "results in" where one might expect to see the word "cause" used. These phrases mean the same thing as "cause" and should be defined in terms of "substantial factor." State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989) and State v. Wille, 2007 WI App 27, 299 Wis.2d 531, 798 N.W.2d 343. See, for example, § 346.17 [Wis JI-Criminal 2630] and § 125.075 [Wis JI-Criminal 5050].

The "Year And A Day" Rule

In State v. Picotte, 2003 WI 42, 261 Wis.2d 249, 661 N.W.2d 381, the court held that the common law year and a day rule had been the law in Wisconsin since statehood. That rule provided that a prosecution for homicide was barred if death occurred more than one year and one day after the act which caused the death. The court exercised its authority to abrogate the rule, finding that it was archaic and no longer made sense. The court further held that "purely prospective abrogation of the year-and-a-day rule best serves the interest of justice. Thus, prosecutions for murder in which the conduct inflicting the death occurs after the date of this decision are permissible regardless of whether the victim dies more than a year and a day after the infliction of the fatal injury." 2003 WI 42, ¶5. The date of the Picotte decision was May 16, 2003.

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905 LIABILITY FOR FAILURE TO ACT – CRIMINAL OMISSION

ADD THE FOLLOWING TO THE INSTRUCTION FOR THE CRIME CHARGED WHEN THERE IS EVIDENCE THAT THE CRIME WAS COMMITTED BY OMISSION.[1]

Criminal liability may be based on either affirmative conduct or on a failure to act.

Evidence has been received that the defendant committed (specify crime) by failing to act. Criminal liability may be based on a failure to act when:

• the defendant has a legal duty to act.[2] In this case, it is alleged that the defendant had a legal duty to (identify the legal duty).[3]

• the defendant has knowledge of facts giving rise to the duty;[4]

• the defendant has the physical ability to act as the duty requires;[5] and,

• the defendant failed to act as the legal duty requires.

For criminal liability based on failure to act, the state must satisfy you beyond a reasonable doubt that all four of these requirements are present and that the defendant's failure to act (specify the harm required for the crime charged).[6]

COMMENT

Wis JI-Criminal 905 was approved by the Committee in March 2015.

Criminal liability for an omission or failure to act is not codified in the Wisconsin Statutes but has been recognized in case law. See the summary titled "The Basis For Omission Liability In Wisconsin" that follows the footnotes below.

Criminal liability for omissions exists in two situations:

• where a statute defines a crime based on a failure to do something that the statute requires be done: failure to pay child support – § 948.22 [see Wis JI-Criminal 2152]; failure to file a tax return – § 71.83(2) [see Wis JI-Criminal 5010].;

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• where a failure to act – when there is a legal duty to do so – substitutes for the act required for a generally applicable crime.

This instruction is drafted for the latter situation. The prosecution is for a generally applicable crime; the omission is a substitute for the "act" expressly or implicitly required by the statute defining that crime. All the regular elements of the crime must be established, along with the components necessary for omission liability.

1. The Committee recommends that the explanation of criminal liability for an omission, or failure to act when there is a legal duty to act, be added to the instruction for the crime charged. An example of how this could be done for a second degree reckless homicide charge based on an omission is provided at Wis JI-Criminal 1060A.

2. State v. Williquette, 129 Wis.2d 239, 251-253, 255-266, 385 N.W.2d 145 (1986).

The existence of a legal duty is the necessary predicate for omission liability. It is likely that a trial court may be requested to make a pretrial ruling whether a legal duty exists based on the facts of the case. If the court concludes that alleged facts, if proved, would support the existence of a legal duty, the case could proceed to trial, where the state will have to prove that the alleged facts exist.

The source of the legal duty must be found in state law. Williquette recognized the common law duty of a parent to protect children from harm. State v. Neumann, 2013 WI 58, ¶104, 348 Wis.2d 455, 832 N.W.2d 560, recognized the duty of a parent to provide medical care to children, basing that duty in part on Williquette, ¶¶105-109, and in part on the fact that "the statute books are replete with provisions imposing responsibility on parents for the care of their children, including the requirement that they provide medical care when necessary." ¶102.

Beyond the situations addressed in Neumann and Williquette there is little direct authority in Wisconsin defining legal duties to act. A leading commentator lists the following potential sources:

1) duty based on relationship – parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner
Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

3. Here, the duty should be identified in general terms. The specific aspects of the duty will be at issue with the fourth requirement: that the defendant failed to act as the duty requires.

4. In State v. Williquette, supra, the court referred to a requirement that the defendant "knowingly act in disregard of the facts giving rise to the duty." 129 Wis.2d 239, 256. Also see State v. Cornellier where the court found the complaint was sufficient in alleging facts tending to show that the defendant knew of the dangerous conditions that led to a fatal explosion in his fireworks factory. 144 Wis.2d 745, 761, 425 N.W.2d 21 (Ct. App. 1988).

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5. See State v.Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law, sec. 2.6).

6. Relying on omission liability substitutes the failure to act for the affirmative act usually required by an offense definition. Therefore, the components of omission liability need to be connected the offense definition for the crime charged. This will often relate to the cause element required by the offense definition. For crimes involving criminal recklessness, the Committee concluded that it is best to connect the requirements for omission liability with the definition of "criminal recklessness." For an example, see Wis JI-Criminal 1060A.

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The Basis For Omission Liability In Wisconsin

Wisconsin statutes do not define omission liability, but case law has recognized it.

State v. Neumann, 2013 WI 58, ¶94, 348 Wis.2d 455, 832 N.W.2d 560, confirmed that a prosecution for reckless homicide under § 940.06 may be based on an omission where a parent failed to provide medical care to a child: "Although the second degree reckless homicide statute, Wis. Stat. § 940.06(1), does not include specific language criminalizing an omission, the parties agree, as do we, that an actor may be criminally liable for a failure to act if the actor has a legal duty to act." [Citing State v. Williquette, 129 Wis.2d 239, 255-56, 385 N.W.2d 145 (1986).] Also see State ex rel. Cornellier v. Black, 144 Wis.2d 745, 758, 425 N.W.2d 11 (Ct. App. 1988): ". . . the statute [referring to § 940.06 1987 Wis. Stats.], impliedly, if not directly, acknowledges that the crime of reckless homicide may be committed by omission, as well as commission."

Neumann referred to Williquette as "the lead case" on omission liability. Williquette involved charges against the wife/mother for abuse of children directly committed by her husband. The defendant was charged under a child abuse statute – § 940.201, since repealed – that prohibited "subjecting a child to cruel maltreatment." The court held that the mother's actions and failure to protect the children were sufficient to constitute "subjecting," but it also directly addressed how an omission can constitute an element of a crime, even where the statute defining that crime is silent on that issue.

> The court, however, also expressly rejects the defendant's claim that an act of commission, rather than omission, is a necessary element of a crime. The essence of criminal conduct is the requirement of a wrongful "act." This element, however, is satisfied by overt acts, as well as omissions to act where there is a legal duty to act. LaFave and Scott, Criminal Law sec. 26 at 182, states the general rule applicable to omissions:
>
> > Some statutory crimes are specifically defined in terms of omission to act. With other common law and statutory crimes which are defined in terms of conduct producing a specified result, a person may be criminally liable when his omission to act produces that result, but only if (1) he has, under the circumstances, a legal duty to act, and (2) he can physically perform the act. The trend of the law has been toward enlarging the scope of duty to act.
> >
> > . . .
>
> The requirement of an overt act, therefore, is not inherently necessary for criminal liability. Criminal liability depends on conduct which is a substantial factor in producing consequences. Omissions are as capable of producing consequences as overt acts. Thus, the common law rule that

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there is no general duty to protect limits criminal liability where it would otherwise exist. The special relationship exception to the "no duty to act" rule represents a choice to retain liability for some omissions, which are considered morally unacceptable.

The defendant argues that imposing criminal liability for omissions is tantamount to creating a common law crime. She notes that sec. 939.10, Stats., specifically abolished common law crimes. Thus, she claims that the criminal code does require an overt act, regardless of whether an overt act otherwise is unnecessary for criminal liability.

Section 939.10, Stats., abolishes common law crimes, but it also states that "the common law rules of criminal law not in conflict with chs. 939 to 948 are preserved." We conclude that the rule applicable to omissions does not define a substantive crime. Failure to act when there is a special relationship does not, by itself, constitute a crime. The failure must expose the dependent person to some proscribed result. The definition of proscribed results constitutes the substantive crime, and it is defined in the criminal code. The rule regarding omissions, therefore, is not inconsistent with chs. 939 to 948.

Our conclusion is supported by persuasive authority. William A. Platz, formerly a Wisconsin Assistant Attorney General and the principal draftsman of the revised criminal code, construed the new code in an authoritative law review article, published contemporaneously with the code in 1956. Platz, The Criminal Code, 1956 Wis.L.Rev. 350. We consider such articles by the principal draftsman of a statutory enactment to be persuasive authority when construing a particular statute. Platz specifically concluded that the rule regarding criminal liability for omissions was not abolished by sec. 939.10, Stats.:

> But the common law rules of criminal law not inconsistent with the code are expressly preserved by sec. 939.10. This is because the code fails to state all the rules, such as the defense of insanity, criminal liability for omissions, and others. It is unfortunate and in part unnecessary that the code omits some of the rules of criminal law which could have been (and were in the 1953 draft) codified.

The 1953 Legislative Council report on the proposed revision of the criminal code contained a section entitled "When Criminal Liability May Be Based on Omissions" (1953 Report, Vol. V at 7). This section was deleted from the final version of the 1955 code. Nonetheless, we agree with Platz that the rule regarding omissions was not abolished because it is not inconsistent with the criminal code.

State v. Williquette, 129 Wis.2d 239, 251-255, 385 N.W.2d 145 (1986).

The section of 1953 draft of the criminal code referred to in the quoted material above states the basic principles of omission liability that are reflected in this instruction:

339.09 When A Criminal Liability May Be Based On Omissions.

Criminal liability may be based upon an omission to act only if under the circumstances the actor has a legal duty to act and he is physically capable of performing that act and the crime charged is specifically prohibited by statute.

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The Existence of a Legal Duty

The key requirement for omission liability is the establishment of a legal duty to act. The decisions in Neumann and Williquette recognize the duty of a parents to protect their children. Beyond that situation, there is less direct authority defining a duty to act. A leading commentator lists the following potential sources:

1) duty based on relationship – parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner

Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

Failure To Act v. Affirmative Conduct

In some situations, it may be possible to characterize the basis for the defendant's criminal liability as affirmative conduct, making reliance on omission liability unnecessary. For example:

- leaving children in the home where they are abused could be characterized as an affirmative act [leaving] rather than an omission [failure to protect];
- leaving chemicals in improper storage conditions [improper storage rather than failure to properly store];
- praying for a seriously child's recovery rather than taking the child for medical treatment.

In these situations, the basis for criminal liability should be clearly identified:

- conduct and failure to act should not be combined, that is, "did X or failed to do Y" should not be presented as undefined alternatives;
- relying on omission liability may often be a clearer way to frame the issue – allowing a direct focus on exactly what the defendant did wrong;
- if there is to be any reliance on omission, all the requirements for omission liability must be presented – they become, in effect, additional elements of the crime.

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910 DANGEROUS WEAPON — § 939.22(10)

"Dangerous weapon" means[1]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.[2]][3]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[4]][5]

[any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood.][6]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.][7]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[8]][9]

COMMENT

Wis JI-Criminal 910 was originally published in 1989 and revised in 1993, 1994, 1996, 2000, 2002, and 2009. This revision was approved by the Committee in October 2011; it updated the comment to reflect 2011 Wisconsin Act 35.

This instruction is intended to provide a basic definition of "dangerous weapon." Its substance is incorporated into instructions for offenses having "dangerous weapon" as an element. The comment here contains a more complete discussion of the substantive issues relating to the definition.

Section 939.22(10) reads as follows, as amended by 2011 Wisconsin Act 35:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely,

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breathing or circulation of blood; any electric weapon, as defined in § 941.295(1c)(a); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

The Comment in the 1953 Judiciary Committee Report on the Criminal Code explains the statutory definition as follows:

> A firearm is treated as a dangerous weapon whether or not it is loaded. It often is very difficult to prove that a weapon was loaded unless it was actually fired. Furthermore, from the standpoint of safety it is desirable to treat an unloaded firearm the same as a loaded one, for there are numerous occasions when "unloaded" firearms have discharged with disastrous results. Things like blackjacks and brass knuckles are dangerous weapons per se. They are designed as weapons and have few, if any, lawful uses. As to other devices or instrumentalities, their classification as dangerous weapons must depend on the manner in which they are used or intended to be used rather than on their inherent dangerousness. Automobiles, baseball bats, acid and razors are items ordinarily used for lawful purposes. However, they may be just as lethal as firearms or blackjacks if they are used in a manner calculated or likely to produce death or great bodily harm. If so found, or if intended to be so used, they fall within the definition of "dangerous weapon."

1. Choose the alternative supported by the evidence.

2. Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

3. See discussion of loaded and unloaded firearms in this comment preceding note 1.

Air guns do not qualify as firearms under this definition but may be dangerous weapons as "devices designed as a weapon and capable of producing death or great bodily harm," or, when used as a bludgeon, as a "device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." See Rafferty v. State, 29 Wis.2d 470, 138 N.W.2d 741 (1966); and Boyles v. State, 46 Wis.2d 473, 175 N.W.2d 277 (1970). Also see State v. Antes, 74 Wis.2d 317, 246 N.W.2d 671 (1976). Rafferty was cited in support of the conclusion that a "BB" air pistol is a dangerous weapon in In Interest of Michelle A.D., 181 Wis.2d 917, 512 N.W.2d 248 (Ct. App. 1994).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

5. This alternative is intended to apply to items designed as weapons, such as blackjacks or brass knuckles. See this comment preceding note 1. Such items must be capable of producing death or great bodily harm. This category can be applied to air guns. See note 3, supra.

6. This alternative was added to the definition in § 939.22(10) by 2007 Wisconsin Act 127. [Effective date: April 4, 2008.]

7. The definition of electric weapon is adapted from the one provided in § 941.295(1c)(a), which reads as follows:

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In this section, "electric weapon" means any device which is designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate persons by the use of electric current.

8. See note 4, supra.

9. This is the broadest category under the statute and can extend to virtually any "device or instrumentality" capable of producing death or great bodily harm. The Wisconsin Supreme Court has held that large soft drink bottles can qualify as dangerous weapons under this part of the definition. See Langston v. State, 61 Wis.2d 288, 293, 212 N.W.2d 113 (1973). The same is true with regard to a bottle of nitroglycerine. Beamon v. State, 93 Wis.2d 215, 219, 286 N.W.2d 592 (1980). Also see this comment preceding note 1. A "BB" air pistol is a dangerous weapon under this category. See note 3, supra.

In State v. Sinks, 168 Wis.2d 245, 483 N.W.2d286 (Ct. App. 1992), the court of appeals held that a dog could qualify as a dangerous weapon under the "instrumentality" alternative. The court found the plain language of the statute "sufficiently broad to include animate, as well as inanimate, objects." 168 Wis.2d 245, 253.

In State v. Bodoh, 226 Wis.2d 718, 736, 595 N.W.2d 330 (1999), the Wisconsin Supreme Court relied on Sinks and the definition of § 939.22(10) to hold that "a dog can be a dangerous weapon if it is used or intended to be used in a manner calculated or likely to cause death or great bodily harm." The decision emphasized:

> . . . It is the manner in which the dog is used and the nature of the act that is determinative of whether the dog is a dangerous weapon. . . . We must . . . determine whether there was sufficient evidence presented to the jury to prove that Bodoh used or intended to use his two Rottweiler dogs in a manner so as to produce death or great bodily harm.

226 Wis.2d 718, 726-27.

The Committee concluded that in cases like Sinks and Bodoh, a tailored instruction would be more helpful than providing only the abstract statutory definition. The Committee recommends adding something like the following:

> In this case, the state claims that the dogs were dangerous weapons. Dogs can be dangerous weapons but only if the defendant used or intended to use them in a manner likely to cause great bodily harm or death.

In State v. Frey, 178 Wis.2d 729,505 N.W.2d 786 (Ct. App. 1993), the court of appeals concluded that the defendant's bare hands are not "instrumentalities" under § 939.22(10). The court found that while the statutory language was ambiguous, there were several reasons for excluding parts of the accused's anatomy: (1) an undefined standard would be presented to the jury; (2) aggravated use of body parts can be accommodated by the penalty provisions that already increase penalties where serious injury is caused; and (3) the "rule of lenity" should be applied where a statute is ambiguous.

[The previous version of this instruction reached the same conclusion. The explanation of the Committee's decision has been dropped from this footnote in light of Frey.]

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In State v. Bidwell, 200 Wis.2d 200, 206, 546 N.W.2d 507 (Ct. App. 1996), the court held that a motor vehicle could qualify as a "dangerous weapon" as "an instrumentality which, in the manner it was used, was likely to produce death or great bodily harm." Thus, it was proper to enhance Bidwell's sentences for second degree reckless homicide and second degree reckless injury with the "while armed" provision of § 939.63. The court cautioned that this should be reserved for "the most egregious circumstances" and found they were present in this case: ". . . a drunk driver who operated his car recklessly for miles in heavy traffic near the City of Kenosha in mid-day with a blood/alcohol level twice the legal limit. . . . [He] was fully aware of the risk as he had been arrested for drunken and reckless driving several times in the past." 200 Wis.2d 200, 206, at note 2.

A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, 162.

Using Wis JI-Criminal 910 for the alternative involved in that case would result in the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

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914 GREAT BODILY HARM — § 939.22(14)

Great bodily harm means injury which creates a substantial risk[1] of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[2]

COMMENT

Wis JI-Criminal 914 was originally published in 1989 and revised in 2005. This revision was approved by the Committee in April 2008.

Section 939.22(14), defining "great bodily harm," was amended by 1987 Wisconsin Act 399 to read as follows:

> "Great bodily harm" means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury. (Emphasis added.)

The underlined words were added to replace "high probability" which was deleted. The change was part of the revision of the homicide statutes, originally introduced as 1987 Senate Bill 191, and passed as part of the budget bill, 1987 Wisconsin Act 399. The effective date for the change is January 1, 1989.

The change from "high probability" to "substantial risk" is discussed in note 1, below.

1. "Substantial risk" was substituted for "high probability" by a legislative change effective January 1, 1989, enacted as part of the revision of the state's homicide statutes. The change in the definition of "great bodily harm" was part of the original homicide revision bill, 1987 Senate Bill 191. The Note to the bill states: "The words 'substantial risk' are substituted for 'high probability' to avoid any inference that a statistical likelihood greater than 50% was ever intended." 1987 Senate Bill 191, NOTE to Section 42.

2. The interpretation of the phrase "other serious bodily injury" has undergone a change in decisions of the Wisconsin Supreme Court.

In State v. Bronston, 7 Wis.2d 627, 97 N.W.2d 504 (1959), the court concluded that the injuries suffered in the case did not constitute great bodily harm as a matter of law. It reached that conclusion by invoking two commonly accepted rules of statutory construction: First, that penal statutes are to be interpreted strictly against the state and in favor of the accused; second, that the canon of statutory interpretation, ejusdem generis, was applicable. The court applied those rules of construction to interpret "other serious bodily injury" in light of the other types of injury described by the more specific language of the statute. This interpretation of the statute has been reversed by more recent decisions of the court.

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In LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976), the court reexamined the legislative history of the great bodily harm definition and concluded that "other serious bodily injury" was a phrase of distinct meaning, intended to broaden the scope of the statute rather than to limit it. The court found that adding that phrase to the statute in 1955 was intended to include serious bodily injury of a kind not encompassed in the specific language of the original statute. Accordingly, the court overruled the ejusdem generis rationale of Bronston. The court found that under the facts of the LaBarge case, it was for the jury to decide whether or not the injury suffered constituted "serious bodily injury." Also see, Cheatham v. State, 85 Wis.2d 112, 270 N.W.2d 194 (1978) and State v. Wellington, 2005 WI App 243, 288 Wis.2d 264, 707 N.W.2d 907.

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915 ACTING IN OFFICIAL CAPACITY

_____[1] act in an official capacity when they perform duties that they are employed[2] to perform.[3] [The duties of a _____ include: _____.[4]]

COMMENT

Wis JI-Criminal 915 was originally published in 1988 and revised in 1991 and 2005. This revision was approved by the Committee in February 2008.

The phrase "acting in an official capacity" or its equivalent is used in the following statutes: § 940.20(2), Battery to a Law Enforcement Officer or Fire Fighter (see Wis JI-Criminal 1230); § 940.20(2m), Battery to a Probation and Parole Agent or Aftercare Agent (see Wis JI-Criminal 1231); § 940.20(5), Battery to a Technical College District or School District Officer or Employee (see Wis JI-Criminal 1235); § 940.20(7), Battery to an Emergency Department Worker, an Emergency Medical Technician, a First Responder, or an Ambulance Driver (see Wis JI-Criminal 1237); § 940.203, Battery or Threat to a Judge (see Wis JI-Criminal 1240A and 1240B); § 940.205, Battery or Threat to a Department of Revenue Employee (see Wis JI-Criminal 1242); § 940.207, Battery or Threat to a Department of Commerce or Workforce Development Employee (see Wis JI-Criminal 1244); § 941.21, Disarming a Peace Officer (see Wis JI-Criminal 1328); § 946.41, Resisting or Obstructing an Officer (see Wis JI-Criminal 1765-1766A). While the Wisconsin appellate courts have tended to use the same definition for the phrase under each statute (see note 3, below), the Committee suggests using Wis JI-Criminal 915 only for those offenses where the officer or employee is the victim of the crime. Using the same definition for crimes where the officer is the defendant (for example, for § 946.12, Misconduct in Public Office) creates the problem that acts of an illegal nature would never fall within the scope of what the person was employed to do. See State v. Schmit, 115 Wis.2d 657, 665, 340 N.W.2d 752 (Ct. App. 1983), discussed in note 3, below.

1. Use the plural form of the title. For example: "Sheriffs act in an official capacity if they perform duties. . . ."

2. The word "employed" is used in its broad sense of "using or engaging the services of another." Webster's New Collegiate Dictionary. In cases involving public officials, it may be helpful to substitute "elected" or "appointed" for "employed," as appropriate.

3. The Wisconsin cases on "official capacity" have reached general agreement on a definition for the term, using the same definition regardless of the statute being reviewed. The results in the cases, however, have not been entirely what one might expect. A review of the Wisconsin case law yields the following:

(1) Williams v. State, 45 Wis.2d 44, 172 N.W.2d 31 (1969).
An off-duty police officer who was attacked while attempting to break up a fight was acting in his official capacity (under § 940.205, Battery to a Law Enforcement Officer).

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(2) State v. Barrett, 96 Wis.2d 174, 291 N.W.2d 498 (1980).
A deputy sheriff conducting a traffic stop in a neighboring county was not acting in his official capacity (also under § 940.205).

(3) State v. Christensen, 100 Wis.2d 507, 302 N.W.2d 448 (1981).
A town constable investigating a disturbance was acting in his official capacity (under § 946.41, Resisting or Obstructing an Officer).

(4) State v. Schmit, 115 Wis.2d 657, 340 N.W.2d 752 (Ct. App. 1983).
A prison guard who engages in consensual sexual intercourse with a prisoner while on duty was not acting in her official capacity (under § 946.12, Misconduct in Public Office).

In State v. Barrett, a definition of "official capacity" was adopted for purposes of the battery to a peace officer statute. It was applied to resisting an officer in State v. Christensen and misconduct in public office in State v. Schmit. In Barrett, the court adopted a definition for the term "official duties" given in United States v. Heliczer, 373 F.2d 241, 245 (2d Cir. 1967):

> "Engaged in . . . performance of official duties" is simply acting within the scope of what the agent is employed to do. The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own. It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful.

The Barrett opinion elaborated on this definition as follows:

> The deputy sheriff in this case was not performing any of the duties conferred upon him as a deputy sheriff of Richland county when he questioned the defendant in Grant county. Once he crossed the county line, unless his purpose i[n] questioning and detaining the defendant, had some relation to his employment as a deputy in Richland county, he was no longer acting in his official capacity. By the phrase "some relation to his employment," we mean that he must be acting as a peace officer, that is, he must be doing "police work" and he must be acting with the powers vested in him as a peace officer. In this case, Officer Breneman must not only have been questioning the defendant as a deputy sheriff but he must also have been acting with the powers of a deputy sheriff for Richland county. If a deputy sheriff crosses the county line of his employment and if there are no circumstances of his employment extending his duty to act, then the attempt to exercise his powers as a peace officer outside of his county of employment is not within the scope of his employment. 96 Wis.2d 174, 180-81.

The definition in Wis JI-Criminal 915 attempts to identify the essential attributes of the Barrett definition.

4. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

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920 POSSESSION

"Possession" means that the defendant knowingly[1] had actual physical control of the item.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.][2]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.][3]

COMMENT

Wis JI-Criminal 920 was originally published in 1986. The comment was revised in 1990. The 2000 revision made nonsubstantive changes in the text and updated the comment.

Wis JI-Criminal 920 is intended to offer a basic definition of "possession." Its substance is incorporated into instructions for offenses having "possession" as an element.

This instruction, and the discussion of "constructive possession" in note 2, was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

The definition of "possession" in this instruction was cited with approval in State v. Peete, 185 Wis.2d 4, 16, 517 N.W.2d 149 (1999).

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

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2. The basic definition requires "actual physical control." The bracketed, optional paragraphs are intended for cases where the object is arguably under the defendant's control but not directly in his physical possession.

Cases sometimes refer to "constructive possession" to resolve this question, placing substantial reliance on the concept without making clear the exact role it is playing. After reviewing such cases, it seems that it is preferable not to refer to "constructive possession" as a substitute or alternative for "real" possession. Rather, it should be viewed as a description of circumstances that are sufficient to support an inference that the person exercised control over, or intended to possess, the item in question. These are aspects of "real," not "constructive," possession.

A decision of the Wisconsin Court of Appeals is consistent with this analysis. State v. R. B., 108 Wis.2d 494, 322 N.W.2d 502 (Ct. App. 1982), involved a charge of possession of beer by a minor in violation of § 66.054(20), since recodified as § 125.07(4). The state argued that R. B. "constructively" possessed beer because he knew there was beer present, it was immediately accessible to him, and he could easily exercise "dominion and control" over it whenever he chose to do so.

The court of appeals found the evidence insufficient to support a finding of "possession."

> We conclude that the mere presence of R. B. at the party, even coupled with his knowledge of the presence of beer and its accessibility to him, is insufficient to constitute possession for purposes of sec. 66.054(20)(b). Even under Dodd, the opportunity to possess, standing alone, does not establish possession. There must additionally be the exercise of some dominion or control over the substance. Unfortunately, the terms "dominion" and "control" are nothing more than labels used by courts to characterize a given set of facts. They are not informative in any functional manner and have been appropriately subject to criticism. See Whitebread and Stevens, Constructive Possession In Narcotics Cases: To Have And Have Not, 58 Va. L. Rev. 751 (1972). To be functional, the dominion and control necessary to permit conviction based on constructive rather than actual possession requires that the facts permit the inference of an intent to possess.
>
> Constructive possession is a legal concept used by courts to find possession where the facts and circumstances demand that the individual acquire the legal status of a possessor. In applying this concept, however, we must keep in mind that the basic question is whether the defendant did in fact possess the prohibited item. Blind application of the constructive possession concept as proposed by the state would require a finding of possession in many instances where possession in fact does not exist. This case is a good example. Under the state's theory of constructive possession, liability would be imposed upon a minor for being present at a place where beer is being used. Presumably, the individual who knows of its use must either leave or report a violation. Arguably, absent express statutory prohibition of a minor being in the presence of beer, judicial use of a possession statute to impose such broad liability usurps the legislature's proper function.
>
> If the doctrine of constructive possession is to have a rational role in the law, the inquiry must focus on the control element of the general possession offense. Unless actual control exists, there must be found from the surrounding facts and circumstances, aided by reasonable inferences, an

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intent to exercise control over the prohibited item. Without such a finding, there can be no constructive possession. The trial court finding that R. B. did not intend to possess the beer must therefore defeat the conviction. Intent to possess or evidence that would support an inference of possession are absent.

108 Wis.2d 494, 496-98.

3. See, for example, Curl v. State, 40 Wis.2d 474, 482-83, 162 N.W.2d 77 (1968).

Also see, Schmidt v. State, 77 Wis.2d 370, 379, 253 N.W.2d 204, 208 (1977): "[p]ossession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, providing that the accused has knowledge of the presence of the drug."

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923A "INTENTIONALLY" AND "WITH INTENT TO": MENTAL PURPOSE — § 939.23(3) and (4)[1]

("Intentionally") (With intent to") means that the defendant must have had the purpose to _____.[2]

["Intentionally" also requires that the defendant must have acted with knowledge that _____.][3]

Deciding About Intent[4]

You cannot look into a person's mind to find intent.[5] Intent to _____[6] must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

[OPTIONAL LONG FORM]

[Deciding About Intent]

[You cannot look into a person's mind to find intent. You may determine intent directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate state of mind. You may find intent to _____[7] from statements or conduct, but you are not required to do so. You are sole judges of the facts, and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to _____.][8]

When May Intent Exist?[9]

While the law requires that the defendant acted with intent to _____, it does not require that the intent exist for any particular length of time before the act is committed. The

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act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to _____ may be formed at any time before the act, including the instant before the act and must continue to exist at the time of the act.

Intent and Motive[10]

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

COMMENT

This instruction replaced Wis JI-Criminal 923.1 which was originally published in 1989. It was revised in 2001. This revision was approved by the Committee in June 2009; it added the second paragraph below to the comment.

This instruction is intended as a reference for the various issues relating to the definition of "intentionally" and "with intent to" as those terms are used in the Wisconsin Criminal Code. Seldom, if ever, would all the parts of this instruction be given in a single case but putting them all in one place allows more complete discussion of the substantive issues and is intended to provide for convenient cross-reference in the instructions for individual offenses.

Most of the uniform offense instructions contain the "Deciding About Intent" paragraph above, but not the "When May Intent Exist" or "Intent and Motive" paragraphs. When either or both of those issues are important in a particular case the relevant paragraph(s) should be added.

The definitions of these terms in § 939.23(3) and (4) were modified by 1987 Wisconsin Act 399, effective January 1, 1989. See note 1, below.

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1. 1987 Wisconsin Act 399 amended § 939.23(3) and (4) as follows:

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally." (Emphasis added.)

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. (Emphasis added.)

The addition of the material underlined above was part of the revision of the homicide statutes originally introduced as 1987 Senate Bill 191 and passed as part of the budget bill, 1987 Wisconsin Act 399. The effective date for the change is January 1, 1989. It applies to homicide cases as well as all other Criminal Code offenses, the more limited definition of "intent to kill" in § 940.01 having been repealed by the same legislation.

This instruction deals only with the mental purpose and knowledge aspects of the definition, which have not been changed. The new alternative — "practically certain to cause that result" — is discussed in Wis JI-Criminal 923B.

2. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

3. Here identify those facts "which are necessary to make the conduct criminal and which are set forth after the word 'intentionally'," in the statute defining the crime. § 939.23(3). For example, with a charge of burglary under § 943.10, the defendant must know that the owner has not consented to the entry: "without the consent of the person in lawful possession" is a fact necessary to make the conduct criminal, and it is set forth in the statute after the word "intentionally."

4. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. Instructions formerly used a longer description of the intent-finding process, which is provided in brackets in the instruction for use where the court believes it will be helpful to the jury.

5. Where knowledge of facts is also required (see note 3, supra), modify this paragraph to read "intent and knowledge" throughout.

6. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

7. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

8. This paragraph was developed by the Committee in 1977 to replace the formerly used language: "The law presumes that a reasonable person intends all of the natural, probable, and usual consequences of his deliberate acts." This paragraph was considered preferable because it avoids two problems of

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constitutional dimensions: the potential for relieving the prosecution of its burden of establishing all elements of the crime beyond a reasonable doubt; and the danger of shifting the burden of proof to the defendant on an element of the crime. The paragraph also meets the requirements of Wis. Stat. § 903.03(3), which applies to instructing the jury on presumptions in criminal cases. After the change was approved by the Committee, two decisions of the United States Supreme Court held instructions unconstitutional which used variations of "the law presumes. . . ." See United States v. United States Gypsum, 438 U.S. 422 (1978), and Sandstrom v. Montana, 442 U.S. 510 (1979).

With the passage of time, the connection with "the law presumes" version has become more attenuated and the Committee concluded that the longer paragraph no longer serves a need that cannot be met equally well by the shorter one. The long form is preserved here in the event that there may be a need for it. In no circumstances should an instruction on intent include the "the law presumes . . ." language.

9. This paragraph is incorporated into several of the standard instructions where the timing of formation of intent can be an important issue. See, for example, Wis JI-Criminal 1010, First Degree Intentional Homicide, and Wis JI-Criminal 1421, Burglary With Intent To Steal.

This paragraph is adapted from the one used for many years in the instruction for first degree murder. See Wis JI-Criminal 1100, © 1980. It addresses the issue referred to as "premeditation" in the common law of homicide and used in the Wisconsin Statutes that predated the 1956 revision of the Criminal Code. This paragraph has traditionally been used primarily in homicide cases. However, occasionally a "premeditation" type of issue may arise in other cases where attention is focussed on the timing of the formation of intent. This could logically happen in battery cases with respect to the intent to cause bodily harm or in burglary cases with respect to the intent to steal or commit a felony. In those situations, this paragraph may be useful as a model for an addition to the standard instruction.

10. This paragraph is based on Wis JI-Criminal 175, Motive. It is incorporated into several of the standard instructions where evidence of motive is believed to be likely. See, for example, Wis JI-Criminal 1010, First Degree Intentional Homicide. It is not necessarily appropriate for use in every instruction where intent is an element, but may, depending on the facts, be worth adding to standard instructions that do not already incorporate it.

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923B "INTENTIONALLY" AND "WITH INTENT TO": "PRACTICALLY CERTAIN"[1] — § 939.23(3) and (4)

("Intentionally") ("With intent to") means that the defendant must have had the mental purpose to _____[2] or was aware that his conduct was practically certain to cause that result.[3]

[CONTINUE WITH OTHER PARAGRAPHS FROM WIS JI-CRIMINAL 923A AS APPROPRIATE.][4]

COMMENT

This instruction replaces Wis JI-Criminal 923.2, which was originally published in 1989. This revision, which made no substantive change, was approved by the Committee in March 2001.

Two appellate decisions have addressed the revised intent definition. In State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), the court held that the definition in § 939.23(4) applies to the term, "with intent that" found in the attempt statute, § 939.32. In State v. Smith, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), the court held that the definition in § 939.23(3) did not violate constitutional principles of due process or vagueness. As to due process, the court held that the two alternatives in the definition of "intentionally" "are merely alternative means in which intent is manifested" and that "it was not necessary that all jurors agree that Smith acted with a purpose to cause the fire, or that he acted with an awareness that his conduct was practically certain to cause that result." 170 Wis.2d 701, 713. As to vagueness, the court held that the definition of intent "is not so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." 170 Wis.2d 701, 712.

1. This instruction addresses the change in the definitions of "intentionally" and "with intent to" made by 1987 Wisconsin Act 399, effective date: January 1, 1989.

This change was made as part of the revision of Wisconsin's homicide statutes which was originally introduced as 1987 Senate Bill 191 and adopted as part of 1987 Wisconsin Act 399, the budget bill. The words, "is aware that his or her conduct is practically certain to [cause that result]," were substituted for "believes his act, if successful, will [cause that result]." See note 1, Wis JI-Criminal 923A for the revised text of subsections (3) and (4) of § 939.23. The more limited definition of "intent to kill" in § 940.01 was repealed so that the new definition applies to homicide offenses as well as to all other Criminal Code offenses.

The phrase in the former statutes "believed his act, if successful, would have that result" was not widely understood or used. It apparently was intended to reach the situation where a person had not formed the

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actual mental purpose to cause the prohibited result but believed that his act would cause it. For example, assume a criminal suspect is being chased through a parking lot by police in lawful pursuit. In trying to escape, the suspect runs across the hoods of several parked cars, causing serious damage to them. The suspect, if charged with criminal damage to property, might honestly be able to say that he had not acted with the mental purpose to cause damage to the cars. But he probably did hold the belief that his acts would cause damage and thus would have had the required intent under the "believes his acts, if successful . . ." alternative.

The new phrase — "aware that his conduct is practically certain"— is based on the Model Penal Code, § 2.02(2)(b)ii, where almost identical language is used to define "knowingly." Acting either with "mental purpose" or "knowingly" is sufficient for liability for most offenses defined by the Model Penal Code. The basis for this approach is the conclusion that acting with awareness that one's conduct is "practically certain" to cause a result is as blameworthy as acting with the purpose to cause that harm. An example commonly used to illustrate the issue is that of the arsonist who is being paid to burn down a building. He knows that some people are in the building who will not be able to escape, but he sets the fire anyway. He does not have the purpose to cause their deaths; in fact, he hopes they are able to escape. Thus, he would not have "intent to kill" if that intent is limited to "purpose to cause the death of another." But he is "aware that his conduct is practically certain" to cause death and would have acted with the intent to kill under the Model Penal Code formulation now adopted in Wisconsin.

2. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

3. When the "aware that it is practically certain" alternative is in the case, the Committee recommends simply adding it to the statement defining criminal intent. This style is illustrated in Wis JI-Criminal 1010. Jury agreement as to which alternative is established is not required. See State v. Smith, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), discussed in the Comment preceding note 1, supra.

4. The complete alternatives for instructing on intent are set forth at Wis JI-Criminal 923A, and footnotes discuss their appropriate use.

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924 CRIMINAL RECKLESSNESS — § 939.24

"Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.

ADD THE FOLLOWING TO THE DEFINITION OF CRIMINAL RECKLESSNESS WHEN THERE IS EVIDENCE THAT THE CRIME WAS COMMITTED BY OMISSION.[1]

[Criminal recklessness may be based on either affirmative conduct or on a failure to act.

Evidence has been received that the defendant committed (specify crime) by failing to act. Criminal liability may be based on a failure to act when:

• the defendant has a legal duty to act.[2] In this case, it is alleged that the defendant had a legal duty to (identify the legal duty) .[3]

• the defendant has knowledge of facts giving rise to the duty;[4]

• the defendant has the physical ability to act as the duty requires;[5] and,

• the defendant failed to act as the legal duty requires.

For criminal liability based on failure to act, the state must satisfy you beyond a reasonable doubt that all four of these requirements are present and that the defendant's failure to act constituted criminal recklessness.[6]

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COMMENT

Wis JI-Criminal 924 was originally published in 1994 and revised in 1999 and 2005. This revision was approved by the Committee in March 2015; it added to the text to address recklessness based on an omission and revised the Comment to reflect changes made by 2103 Wisconsin Act 307.

This instruction contains the definition of "criminal recklessness" found in the published instructions dealing with crimes of recklessness. It is published separately here to provide a convenient means of collecting appellate court decisions that deal with recklessness and to discuss issues in more detail than may be appropriate in the footnotes for individual offenses. The 1999 revision divided the definition into three parts to emphasize the separate characteristics of "criminal recklessness." For a discussion of the factor which aggravates simple recklessness to a more serious level, see Wis JI-Criminal 924A, Aggravated Recklessness: Circumstances Which Show Utter Disregard For Human Life.

The definition of "criminal recklessness" was created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. Therefore, it applies to offenses committed on or after January 1, 1989. "Criminal recklessness" is used in the following statutes: § 940.02, First Degree Reckless Homicide; § 940.06, Second Degree Reckless Homicide; § 940.23, Reckless Injury, and § 941.30, Recklessly Endangering Safety.

"Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

The first requirement — an unreasonable and substantial risk — is substantially the same as the corresponding part of the definition of "reckless conduct" found in § 940.06(2) before the revision. The only difference is the substitution of "unreasonable and substantial risk" for "a situation of unreasonable risk and high probability." The purpose of that change is to make it clear that no mathematical probability was required.

The second requirement — awareness of the risk — replaces the following statement under prior law: "demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury." The revision makes it clear that recklessness requires a subjective mental state: the defendant must actually (in his or her own mind) be aware of the risk created by the conduct.

The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense if the actor would have been aware of the risk if not intoxicated. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware

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of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element of criminal recklessness. For cases arising before the effective date of Act 307, the suggestion included in the previous version of the Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

For decisions finding evidence sufficient to establish an unreasonable and substantial risk and awareness of that risk, see State v. Johnson, 184 Wis.2d 324, 516 N.W.2d 463 (Ct. App. 1993); and State v. Brulport, 202 Wis.2d 506, 551 N.W.2d 824 (Ct. App. 1996). Both decisions also emphasize that the victim need not sustain serious injury; it is sufficient that the conduct create an unreasonable and substantial risk of death or great bodily harm. Also see State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752, discussing "awareness of the risk" in a case involving a defendant with below average intelligence.

1. Crimes involving criminal recklessness may involve liability based on criminal omission or failure to act when there is a legal duty to act. When this is the case, the Committee recommends that the explanation of criminal liability for an omission be added to the instruction for the crime charged. A general instruction on omission liability is provided at Wis JI-Criminal 905, the substance of which is adapted for use here. An example of how this could be done for a second degree reckless homicide charge based on an omission is provided at Wis JI-Criminal 1060A.

2. State v. Williquette, 129 Wis.2d 239, 251-253, 255-266, 385 N.W.2d 145 (1986).

The existence of a legal duty is the necessary predicate for omission liability. It is likely that a trial court may be requested to make a pretrial ruling whether a legal duty exists based on the facts of the case. If the court concludes that alleged facts, if proved, would support the existence of a legal duty, the case could proceed to trial, where the state will have to prove that the alleged facts exist.

The source of the legal duty must be found in state law. Williquette recognized the common law duty of a parent to protect children from harm. State v. Neumann, 2013 WI 58, ¶104, 348 Wis.2d 455, 832 N.W.2d 560, recognized the duty of a parent to provide medical care to children, basing that duty in part on

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Williquette, ¶¶105-109, and in part on the fact that "the statute books are replete with provisions imposing responsibility on parents for the care of their children, including the requirement that they provide medical care when necessary." ¶102.

Beyond the situations addressed in Neumann and Williquette there is little direct authority in Wisconsin defining legal duties to act. A leading commentator lists the following potential sources:

1) duty based on relationship – parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner

Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

3. Here, the duty should be identified in general terms. The specific aspects of the duty will be at issue with the fourth requirement: that the defendant failed to act as the duty requires.

4. In State v. Williquette, supra, the court referred to a requirement that the defendant "knowingly act in disregard of the facts giving rise to the duty." 129 Wis.2d 239, 256. Also see State v. Cornellier where the court found the complaint was sufficient in alleging facts tending to show that the defendant knew of the dangerous conditions that led to a fatal explosion in his fireworks factory. 144 Wis.2d 745, 761, 425 N.W.2d 21 (Ct. App. 1988).

5. See State v.Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law, sec. 2.6).

6. Relying on omission liability substitutes the failure to act for the affirmative act usually required by an offense definition. Therefore, the components of omission liability need to be connected the offense definition for the crime charged. This will often relate to the cause element required by the offense definition. For crimes involving criminal recklessness, the Committee concluded that it is best to connect the requirements for omission liability with the definition of "criminal recklessness."

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924A AGGRAVATED RECKLESSNESS: CIRCUMSTANCES WHICH SHOW UTTER DISREGARD FOR HUMAN LIFE

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all the other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[1]

[Consider also the defendant's conduct after the [death] [great bodily harm] [act alleged to have endangered safety] to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the [death] [great bodily harm] [act alleged to have endangered safety] occurred.]

COMMENT

This instruction was originally published as Wis JI-Criminal 924.1 in 1994, revised as Wis JI-Criminal 924A in 2005, and revised in 2010. This revision added the material at footnote 1 and was approved by the Committee in December 2011.

This instruction contains the definition of "utter disregard for human life" found in the published instructions for "first degree reckless" offenses. It is published separately here to provide a convenient means of collecting appellate court decisions that deal with "utter disregard" and to discuss issues in more detail than may be appropriate in the footnotes for individual offenses.

The phrase "utter disregard for human life" was created by 1987 Wisconsin Act 399 as part of the revision of Wisconsin's homicide statutes. It applies to offenses committed on or after January 1, 1989. "Utter disregard" is used in the definition of the following offenses: First Degree Reckless Homicide, § 940.02(1); First Degree Reckless Injury, § 940.23(1); and First Degree Recklessly Endangering Safety, § 941.30(1).

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"Under circumstances which show utter disregard for human life" is the factor that distinguishes first degree reckless offenses from second degree reckless offenses. Therefore, it is used only in connection with crimes involving criminal recklessness. See Wis JI-Criminal 924 for the definition of "criminal recklessness." The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).

Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to an aggravated reckless offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978), Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977), and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15 [No. 2010AP2808-CR], ___ Wis.2d ___, ___ N.W.2d ___, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not

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reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶ 18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

In State v. Holtz, 173 Wis.2d 515, 496 N.W.2d 668 (Ct. App. 1992), the defendant appealed his conviction for first degree recklessly endangering safety. The charges were based on his attacking his wife with an axe. He argued that his conduct during the entire episode should be considered, claiming that he finally ceased his aggression, thus showing some regard for his wife's well-being. The court of appeals affirmed, finding that the defendant's show of regard came too late – doing so only after having shown no regard for his wife's life and safety. The court distinguished this case from Wagner and Balistreri, supra where, the court says, concern for the life of another was shown during the commission of the act.

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For other discussions of the "utter disregard" standard under current law, see State v. Barksdale, 160 Wis.2d 284, 466 N.W.2d 198 (Ct. App. 1991), and State v. Blair, 164 Wis.2d 64, 473 N.W.2d 566 (Ct. App. 1991). In both cases, the evidence was found to be sufficient to meet the standard: discharge of a gun during an attempt to collect a drug debt (Barksdale); hitting a person in the head three times with a loaded pistol, which then discharged (Blair).

Also see Arave v. Creech, 507 U.S. 463 (1993), where the court rejected a challenge to the Idaho capital punishment statute, which uses "utter disregard for human life" as a factor authorizing imposition of the death penalty. The majority found it to be a "close question" whether the standard was unconstitutionally vague in the death penalty context. The majority found that further definition of "utter disregard" by the state court made it sufficiently objective to meet constitutional standards.

1. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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925 CRIMINAL NEGLIGENCE — § 939.25

"Criminal negligence" means:[1]

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.

THE COMMITTEE BELIEVES THE ABOVE IS SUFFICIENT IN MOST CASES.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY, CONTINUE WITH THE FOLLOWING.[2]

Criminal negligence is ordinary negligence to a high degree. Ordinary negligence exists when a person creates an unreasonable risk of harm to another by failing to exercise ordinary care. Ordinary care is the amount of care which a reasonable person exercises under similar circumstances. Negligence does not require that the person be aware of the risk of harm that his or her conduct creates; it is sufficient that a reasonable person in the same circumstances would be aware of that risk.[3]

Criminal negligence differs from ordinary negligence in two respects. First, the conduct must create a risk not only of some harm but also of serious harm — that is, of death or great bodily harm. Second, the risk of that harm must not only be unreasonable, it also must be substantial. Therefore, for the defendant's conduct to constitute criminal negligence, the defendant should have realized that the conduct created a substantial and unreasonable risk of death or great bodily harm to another.[4]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED,[5] ADD THE FOLLOWING:

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that

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Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

COMMENT

Wis JI-Criminal 925 was originally published in 1994 and revised in 1999. This revision adopted a new format and was approved by the Committee in February 2005.

The current definition of "criminal negligence" in § 939.25 was created by 1987 Wisconsin Act 399, as part of the revision of Wisconsin's homicide statutes. It applies to offenses committed on or after January 1, 1989. It is used in the following statutes: § 940.08, Homicide By Negligent Handling Of A Dangerous Weapon, Explosives, Or Fire; § 940.10, Homicide By Negligent Operation Of A Vehicle; § 346.62, Reckless Driving; § 941.01, Negligent Operation Of A Vehicle (Not Upon A Highway); § 941.10, Negligent Handling Of Burning Material; and § 941.20(1)(a), Endangering Safety By Negligent Use Of A Weapon.

The definition of "criminal negligence" in § 939.25 is not unconstitutionally vague:

> The statute makes clear that causing death by highly negligent operation of a vehicle is prohibited. True, the statute does not tell the public which specific acts are criminally negligent. The statute is incapable of such precision; whether a reasonable person would foresee that the conduct engaged in created an unreasonable and substantial risk of death or great bodily injury will necessarily vary with the facts of each case. This does not make the law unconstitutionally vague.

State v. Barman, 183 Wis.2d 180, 200-01, 515 N.W.2d 493 (Ct. App. 1994).

For cases finding the evidence to be sufficient to establish "criminal negligence," see Barman, supra; State v. McIntosh, 137 Wis.2d 339, 404 N.W.2d 557 (Ct. App. 1987); and, State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Ct. App. 1983).

In a case involving a vehicle that crossed the centerline of a highway, the evidence was sufficient to support a finding of criminal negligence; the jury is not required to agree unanimously about why the vehicle crossed the centerline. State v. Johannes, 229 Wis.2d 215, 228-29, 598 N.W.2d 299 (Ct. App. 1999).

1. The 1999 revision of this instruction divided the definition into three parts to emphasize the separate characteristics of "criminal negligence." The Committee concluded that the relatively brief definition in the first paragraph is sufficient in most cases, and it is included in the body of the instructions for offenses involving criminal negligence. The Committee concluded that the more concise definition is preferable to the approach used in the previously published instructions which began by trying to explain the meaning of "ordinary negligence." Then, the instruction tried to explain that criminal negligence required more than ordinary negligence. The Committee concluded that the statutory definition of criminal negligence is sufficiently clear that it is better to begin with it, rather than offering the potentially difficult definition of ordinary negligence and then asking the jury to go on from there.

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The definition of "criminal negligence" provided in § 939.25 is essentially a restatement of what was known as "high degree of negligence" under prior Wisconsin law. (See § 940.08(2), 1985-86 Wis. Stats.) The only change is to substitute "substantial risk" for "high probability" in describing the risk of harm that must be presented by the conduct.

The nature of the risk is the same for criminal negligence as for criminal recklessness. Criminal recklessness differs in that it requires a subjective awareness of the risk. For criminal negligence, there is an objective standard — the defendant "should realize" the nature of the risk created by the conduct.

2. The paragraphs in brackets are included here in the event that a more extensive definition is believed to be necessary. The first brackets contain a revision of the long-standing definition of ordinary negligence. [Compare Wis JI-Civil 1005.] No substantive change was intended; the revision is believed to be more easily understood.

3. This is a revision of the long-standing definition of ordinary negligence. [Compare Wis JI-Civil 1005.] No substantive change was intended; the revision is believed to be more easily understood.

4. This paragraph attempts to emphasize and clarify the difference between ordinary and criminal negligence. That distinction is discussed in Hart v. State, 75 Wis.2d 371, 249 N.W.2d 810 (1977), and State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Ct. App. 1983). (Both cases discuss § 940.08 as it existed before the 1989 homicide revision, but the law has not changed significantly. See note 1, supra.)

Hart involved a collision on a country road between an automobile and a person riding a bicycle. The automobile was going 65 miles per hour in a 55 mile per hour zone and struck the bicyclist in a no-passing zone just over the crest of a hill. The court concluded that

> Passing a bicyclist in a no-passing zone may not always be negligent. However, in this case the defendant passed in an intersection at a high rate of speed, and the jury properly could have found that an ordinarily prudent person would not have done so, but rather would have seen the bicyclist earlier than defendant did, would have moderated his speed well in advance of the intersection, and would have allowed the bicyclist to clear the intersection before overtaking him. The jury could have found that in acting as he did the defendant should have realized that he created a situation of unreasonable risk to persons near the intersection.
>
> Defendant's car was moving at 60 mph at the hillcrest by defendant's own admission, and if the risk of striking a human being on a bicycle at a speed such as this does not carry with it a high probability of death, it is difficult to imagine a situation that would.

75 Wis.2d 371, 397.

In Cooper, the defendant's car went through a red light and struck another vehicle, killing its two occupants. On appeal, the defendant argued that this was only ordinary negligence. The court of appeals disagreed:

> A high degree of negligence, as defined by sec. 940.08(2), Stats., requires not only an unreasonable risk of harm, as in ordinary negligence, but a high probability of death or great bodily harm to another. Consequently, if an actor is ordinarily negligent, and should reasonably foresee that his or her negligence creates a high probability of death or great bodily harm to another, then the second element of the definition is met. Hart at 383, 249 N.W.2d at 814-15.

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> The jury could find that going through a red light at 50 m.p.h. creates a high probability of death or great bodily harm. The legality of the 50 m.p.h. speed has nothing to do with it. Every driver knows or should know that the greater the speed, the greater the impact, and the greater the probability of death or great bodily injury.

117 Wis.2d 30, 38

[The court in Cooper expressed its concern about the result. Though legally correct, it allows a finding of criminal negligence and thus, a felony, when lawful but high speed combines with ordinary negligence. The Wisconsin Legislature and courts have been involved in a series of attempted solutions to this problem. The experience is recounted in Hart, 75 Wis.2d 371, 379-84.]

5. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). In Dyess, the court held that the following instruction violated the requirements of § 903.03 by requiring the jury to find the presumed fact (negligence) upon proof of the basic fact (speeding):

> The safety statute in the motor vehicle code provides that, no person shall drive a vehicle at a speed in excess, and on 14th Street in particular, of 30 miles per hour. Any speed in excess of that limit would be negligent speed regardless of other conditions. It is for you to determine whether Johrie Dyess's speed was over said limit and, if under, whether it was, nevertheless, a negligent speed under the conditions and circumstances then present and under the rules of law given to you in these instructions. (Emphasis in original.) 124 Wis.2d 525, 531.

The court said that if the directions of § 903.03 had been followed, the trial court "would have informed the jury that, if it found as a matter of fact that Dyess was exceeding the posted speed limit of 30 miles per hour, it could regard that fact as sufficient evidence of negligence to make that finding but it was not required to do so." 124 Wis.2d 525, 539.

The suggested instruction tries to implement Dyess and § 903.03 by advising the jury that it is for them to determine the weight to give the evidence that the defendant violated the statute in making its decision whether, under all the circumstances, the defendant's conduct constituted criminal negligence. This format should be used instead of the uniform civil instructions dealing with statutory violations. (See, e.g., Wis JI-Civil 1290.) As the court stated in Dyess: "No one in the instant case finds fault with Civil Jury Instruction No. 1290 as used in civil cases, but the authority to direct a jury in a criminal case that speed in excess of the posted limit, regardless of other conditions, is negligence, is specifically prohibited by sec. 903.03(3)." 124 Wis.2d 525, 536.

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926 CONTRIBUTORY NEGLIGENCE[1] — § 939.14

DO NOT GIVE THE FOLLOWING WITHOUT CLEAR JUSTIFICATION.[2]

Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[3] does not by itself provide a defense to the crime charged against the defendant.[4] Consider evidence of the conduct of (name of victim) only to the extent that it relates to (describe the element of the crime or the defense to which the evidence relates).[5]

COMMENT

Wis JI-Criminal 926 was originally published in 1996 and revised in 1997. This revision adopted a new format and was approved by the Committee in February 2005.

This instruction addresses the rule set forth in § 939.14, which provides as follows: "It is no defense to a prosecution for a crime that the victim also was guilty of a crime or was contributorily negligent." While the use of this statute has tended to emphasize conduct of the victim that could be characterized as "negligence," note that the rule also applies to conduct of the victim that may constitute criminal conduct.

The Committee originally concluded that an instruction on the rule provided in § 939.14 should not be given and Wis JI-Criminal 926 as originally published so advised. However, in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996), the Wisconsin Supreme Court recommended that an instruction be drafted to articulate the rule in § 939.14. The court stated:

> . . . we recommend that the Criminal Jury Instruction Committee adopt a jury instruction that sets forth the law as contained in s. 939.14, to the effect that it is no defense to a prosecution for a crime that the victim was contributorily negligent. The instruction also should contain an explanation of this rule, in particular that it means the defendant is not immune from criminal liability merely because the victim may have been negligent as well. See Hart, 75 Wis.2d 398.
>
> In addition, we recommend that the Committee adopt a bridging instruction to be given when a court gives a contributory negligence instruction along with Wis JI-Criminal 1188, 1185, and/or 1186. The instruction should explain to the jury that although the victim's contributory negligence is not a defense, the jury may consider the acts of the victim in relation to the defendant's § 940.09(2) defense.
>
> It is further recommended that the Committee in its comments caution circuit court judges so that they will not, without clear justification, give a contributory negligence instruction in a criminal case.

205 Wis.2d 182, 197-98.

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This instruction attempts to carry out the court's recommendations. A tailored version of this instruction has been built-in to Wis JI-Criminal 1188, the standard instruction on the affirmative defense applicable to operating under the influence cases. It is intended to provide the bridging instruction the court recommended.

As noted above, the originally published version of Wis JI-Criminal 926 recommended that no instruction be given on the rule set forth in § 939.14. The comment stated:

> The rule as stated is an accurate statement of the law, but can create problems if literally applied. That is, evidence that may indicate negligence on the part of a victim may be relevant to an element of the crime — especially the cause element — or to a defense. In such a situation, the evidence is admissible despite § 939.14.

The comment went on to cite the court of appeals decision in State v. Lohmeier, 196 Wis.2d 432, 538 N.W.2d 487 (Ct. App. 1995), as an example of a case where instructing the jury on the rule of § 939.14 could cause a problem. In Lohmeier, the defendant was charged with two counts of homicide by intoxicated use of a vehicle. The defendant introduced evidence that the two victims were walking on the roadway, offering it in support of the affirmative defense provided in § 940.09(2): ". . . that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant. . . ." The trial court instructed on the defense but added an instruction that ". . . it is no defense to a prosecution for a crime that the victim may have been contributorily negligent." The court of appeals reversed the conviction, holding that

> . . . under the circumstances of this case, the court's jury instruction on contributory negligence effectively denied Lohmeier his defense. Here, the victims' contributory negligence in walking in the roadway, or stepping out into the roadway as Lohmeier's car approached, as alleged by the defense, could have risen to the level of intervening cause, making it impossible for Lohmeier to avoid the accident. This was a question for the jury to decide.

196 Wis.2d 437, 443.

The Wisconsin Supreme Court reversed the court of appeals. Although it found that the jury in that case was not misled by the potentially conflicting instructions, the court made the specific recommendations to the Committee that are addressed in this version of the instruction.

1. The term "contributory negligence" is used only in the title of the instruction. The Committee recommends that the title not be communicated to the jury and has drafted this instruction without using the term. Referring to the rule of § 939.14 by using "contributory negligence" creates difficulties. It is a technical term with a specialized meaning that, if used in an instruction, probably should be explained to the jury. Defining "negligence" is routine, but defining "contributory" is more difficult. The latter connotes that the conduct "contributed" to the harm caused, highlighting potential conflict with the cause element of the crime. Even in civil cases, "contributory negligence" is not a term used in instructing the jury. (It appears in the title, but not in the text of Wis JI-Civil 1008.) Therefore, the instruction does not use the term "contributory negligence." See notes 2 and 3, below.

2. The Lohmeier decision recommended that "the Committee in its comments caution circuit court judges so they will not, without clear justification, give a contributory negligence instruction. . . ." In the

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Committee's judgment, the court's concern about giving an instruction is addressed in two ways by this version of Wis JI-Criminal 926.

First, the Committee drafted the instruction without using the term "contributory negligence" because it concluded that there will rarely be "clear justification" for giving an instruction that uses it. Precisely because of the rule articulated in § 939.14, evidence referring to a victim's conduct as "contributory negligence" should not be admissible and lawyers should not be using the term to describe the victim's conduct. If this is correct, the only clear justification for an instruction using the term "contributory negligence" would be as a curative instruction — to be used when the term "contributory negligence" has mistakenly been used. Wis JI-Criminal 926 is not drafted for that rare situation.

Second, even an instruction like this version of Wis JI-Criminal 926 that does not use the term "contributory negligence" should be given only with "clear justification." Despite the rule of § 939.14, evidence of the victim's conduct will often be relevant and admissible. Where that evidence involves what could be described as negligent conduct, the conflict with § 939.14 emerges. This is the problem Lohmeier dealt with, but the problem was caused by instructing the jury on the § 939.14 rule. Had no instruction been given, the Lohmeier problem would not have existed; the jury would have been unencumbered in considering all evidence relevant to the affirmative defense, including evidence of the victim's conduct that could be characterized as involving "contributory negligence."

The Committee concluded that there is "clear justification" for giving Wis JI-Criminal 926 in the following circumstances: evidence of the victim's conduct has been admitted; that conduct involves what might be described as "negligent" conduct; either the state or the defense requests the instruction; and the trial court concludes that in the context of the particular case, the instruction would add to the jury's ability to understand the legal standard it is to apply.

3. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09,940.25, and 346.63. In cases involving that defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

4. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under, for example, § 940.09(2). To the ordinary person, a "reason why the defendant is not guilty" is likely to be considered a "defense." For this reason, the Committee recommends following this general statement with a more specific description of how the victim's conduct relates to the facts of the particular case. See note 5, below. This, the Committee concluded, is consistent with the recommendations in Lohmeier that a "bridging" instruction be drafted. See the comment preceding note 1, supra.

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5. The Committee recommends identifying the element or the defense to which the evidence of the victim's conduct relates. The element to which it will most often relate is the cause element. The defense most likely to be involved is the one at issue in the Lohmeier case: the affirmative defense available in operating under the influence cases under §§ 940.09, 940.25, and 346.63(2). Wis JI-Criminal 1188, the standard instruction for that affirmative defense, includes the text of Wis JI-Criminal 926 with a tailored "bridge" to the substance of the defense. This is intended to address the third recommendation in the Lohmeier decision. See the comment preceding note 1, supra.

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934 SEXUAL CONTACT — § 939.22(34)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF ANOTHER PERSON [§ 939.22(34)(a)]:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction).[3] The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object or device, but it must be an intentional touching.

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][4]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF ANY PART OF ANOTHER PERSON'S BODY WITH THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON [§ 939.22(34)(b)]:

[Sexual contact is an intentional touching of any part of the body, clothed or unclothed, of (name of victim) with the (name intimate part), clothed or unclothed, of (the defendant) (another person upon the defendant's instruction).[5]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][6]

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FOR SEXUAL CONTACT INVOLVING INTENTIONAL PENILE EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON ANOTHER PERSON [§ 939.22(34)(c)]:

[Sexual contact is (intentional penile ejaculation of ejaculate) (or) (intentional emission of urine or feces) (by the defendant) (by another person upon the defendant's instruction)[7] upon any part of the body, clothed or unclothed, of (name of victim).[8]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][9]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING ANOTHER PERSON TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY [§ 939.22(34)(d)]:

[Sexual contact is (ejaculation) (or) (emission of urine or feces) by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[10]

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).][11]

GIVE THE FOLLOWING IN ALL CASES.

Deciding About Intent and Purpose

You cannot look into a person's mind to find intent or purpose. Intent or purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent and purpose.

CONTINUE WITH THE INSTRUCTION FOR THE OFFENSE.

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COMMENT

Wis JI-Criminal 934 was approved by the Committee in June 2010.

The Wisconsin criminal statutes provide three definitions of "sexual contact" which are substantially similar but not identical. This instruction addresses § 939.22(34), which applies to criminal offenses requiring sexual contact and not appearing in § 940.225 or in Chapter 948. See, for example, sub. (1)(a) of § 940.302, Human Trafficking, and sub. (5) of § 944.30, Prostitution.

The other two definitions of "sexual contact" are found in:

- § 940.225(5)(b), which applies to offenses defined in § 940.225 [see Wis JI-Criminal 1200A]; and,

- § 948.01(5), which applies to offenses defined in Chapter 948 [see Wis JI-Criminal 2101A].

This instruction provides all four alternatives specified by § 939.22(34); each alternative includes the type of touching or emission of bodily substances and the purpose of the touching or emission. This is intended to be more convenient to the users of the instructions and to make it easier to prepare an instruction that is tailored to the facts of the case.

1. The definition of "sexual contact" in § 939.22(34) applies to offenses not found in § 940.225, where the definition in § 940.225(5)(b) applies, or Chapter 948, where the definition in § 948.01(5) applies. Section 939.22(34) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a prohibited purpose. See note 4, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. §948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for a prohibited purpose. The Committee concluded that including purpose as part of each alternative will reduce the possibility that

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it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

5. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

6. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

7. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

8. This is the type of "sexual contact" defined in § 939.22(34)(c). It was created by 1995 Wisconsin Act 69, which first applied to offenses committed on December 2, 1995.

9. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

10. This is the type of "sexual contact" defined in § 939.22(34)(d). It was created by 2005 Wisconsin Act 273, which first applied to offenses committed on April 20, 2006.

11. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

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948 WITHOUT CONSENT — § 939.22(48)

"Without consent" means that there was no consent in fact or that consent was given because

[the defendant put _(name of victim)_ in fear by the use or threat of imminent use of physical violence on (a person in the presence of) (a member of the immediate family of) _(name of victim)_.]

[the defendant purported to be acting under legal authority.]

[_(name of victim)_ did not understand the nature of the thing to which (he) (she) consents, by reason of (ignorance) (mistake of fact)[1] (mistake of law other than criminal law) (youth) (defective mental condition, whether permanent or temporary).]

COMMENT

Wis JI-Criminal 948 was originally published in 1999. This revision adopted a new format and was approved by the Committee in February 2005.

This presents the definition of "without consent" provided in § 939.22(48). In most cases, definition is not likely to be necessary, since the plain and ordinary meaning of the term will be sufficient for the jury. Definition will be appropriate in the case where the victim did in fact give consent, but the consent will not be legally effective because one of the circumstances recognized is present. For example, a person may have consented to the taking of his or her property by the defendant because the defendant threatened a member of the person's family.

NOTE: This definition applies generally to offenses defined in the Criminal Code. Sexual assaults under § 940.225 use a different definition of "without consent" that applies only to violations of § 940.225.

1. For a case relying on the "ignorance" or "mistake of fact" exception, see State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999).

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950 PRIVILEGE: DISCIPLINE BY A PERSON RESPONSIBLE FOR THE WELFARE OF A CHILD — § 939.45(5)[1]

[AFTER THE ELEMENTS OF THE CRIME, BUT BEFORE THE CONCLUDING PARAGRAPHS, ADD THE FOLLOWING.]

Defense of Reasonable Discipline

Discipline of a child is an issue in this case.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act reasonably in the discipline of a child.

The law allows a person responsible for the child's welfare[2] to use reasonable force to discipline that child.[3] Reasonable force is that force which a reasonable person would believe is necessary.[4]

Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[5]

In determining whether the discipline was or was not reasonable, you should consider the age, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.[6] It is never reasonable discipline to use force which is intended to cause great bodily harm or death or which creates an unreasonable risk of great bodily harm or death.[7]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all ____ elements of this offense[8] have been proved and that the defendant did not act reasonably in the discipline of (name child), you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 950 was originally published in 1962 and revised in 1986, 1989, 1994, 1996, 2001, and 2006. This revision added footnotes 3 and 4 and was approved by the Committee in October 2013.

This instruction is for cases involving the privilege of reasonable discipline of a child as codified in § 939.45(5). That statute was amended by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. The primary change from prior law was the substitution of "person responsible for the child's welfare" for "parent or a person in the place of a parent." Compare § 939.45(5), 1985-86 Wis. Stats.

This instruction is drafted for cases involving the use of force against a child where it has resulted in a harm prohibited by law. Most often, the harm will be physical injury. However, § 948.04 penalizes the causing of mental harm to a child, a harm that could be caused by conduct not amounting to the use of force, though undertaken in the name of parental discipline. The Committee interprets the statute defining the privilege as applying to all conduct undertaken for the purpose of discipline, including conduct not involving the use of force. This instruction, however, is drafted for a case involving the use of force, which ought to be the most common situation.

Wis JI-Criminal 950 was originally recommended for cases involving intentional causing of harm; Wis JI-Criminal 951 tailored the privilege of parental discipline for cases involving recklessness. In 2014, the Committee concluded that Wis JI-Criminal 950 was suitable for use in all cases and Wis JI-Criminal 951 was withdrawn. The instruction on the privilege should be integrated with the instruction on the offense charged. See, for example, Wis JI-Criminal 1220A, which combines the privilege of self-defense with the instruction on battery.

For a discussion of the substance of this defense, see State v. Kimberly B., 2005 WI App 115, 283 Wis.2d 731, 699 N.W.2d 641, which found the evidence was sufficient to allow the jury to "reasonably conclude that Kimberly was not making a genuine effort to discipline [the victim] by proper means . . . and that she instead was resorting to excessive and unreasonable force, abusive rather than corrective in nature." Kimberly B., ¶37.

1. Statutory privileges are treated as "affirmative defenses" in Wisconsin. That is, the absence of the privilege need not be alleged in the charging document or presented as part of the state's case-in-chief. But once there is some evidence of the privilege in the case, the burden is on the state to prove beyond a

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reasonable doubt that the defendant's conduct was not privileged. See, e.g., Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

2. "Person responsible for the child's welfare" is defined as follows in subsec. (a)3. of § 939.45(5):

> "Person responsible for the child's welfare" includes the child's parent, stepparent, or guardian; an employe of a public or private residential home, institution or agency in which the child resides or is confined or that provides services to the child; or any other person legally responsible for the child's welfare in a residential setting.

[NOTE: "Stepparent was added to the definition by 1995 Wisconsin Act 214 (effective date: May 1, 1996). This definition is not the same as the one provided in § 948.01(3) for the same term. See Wis JI-Criminal 2114.]

"Child" means a person who has not attained the age of 18 years. See §§ 939.45(5)(a)1 and 948.01(1).

In State v. West, 183 Wis.2d 46, 515 N.W.2d 484 (Ct. App. 1994), the court held that the plain language of § 939.45(5)(a)3. included "foster parent." They are persons "legally responsible for the child's welfare in a residential setting."

In State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), the court found that a live-in boyfriend was not a "person responsible" under § 939.45(5). The court concluded that the statutory definition does not extend to those who arguably would qualify under an "in loco parentis" standard.

In State v. Evans, 171 Wis.2d 471, 492 N.W.2d 141 (1992), the court interpreted the same phrase — "person responsible for the child's welfare" — as defined in § 948.01(3) for purposes of imposing criminal liability for various Chapter 948 offenses. The court held that under that statute, one who acknowledges in writing that he is the biological father of a child is the child's "parent," even though he had not been adjudicated the father.

Also see State v. Ward, 228 Wis.2d 301, 596 N.W.2d (Ct. App. 1999), holding that an unpaid babysitter is a "person responsible" under § 948.01(3), and State v. Hughes, 2005 WI App 155, 285 Wis.2d 388, 702 N.W.2d 87, reaching the same conclusion with regard to a 17-year-old voluntary caretaker.

3. State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, stated that the first part of the test for the privilege of parental discipline is that it be for the purpose of disciplining the child:

> ¶29 Under **Kimberly B.**, the privilege of reasonable parental discipline imposes a two-part inquiry. First, the force used must be disciplinary, and not imposed "with a malicious desire to inflict pain." **Id.** Thus, if the parent's acts are not disciplinary, but merely an expression of rage and frustration towards the child, the acts are not protected by the privilege of reasonable parental discipline. If the acts are disciplinary, they are privileged if the amount and nature of force is reasonable, and not inflicted "immoderately, cruelly, or mercilessly." **Id.**

4. State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, also identified three factors for determining if discipline is reasonable:

> (1) the use of force must be reasonably necessary; (2) the amount and nature of the force used must be reasonable; *and* (3) the force used must not be known to cause, or create a substantial risk of,

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great bodily harm or death." **Id.**, ¶30. We also explained that the reasonableness of the amount of force used in imposing discipline is an objective standard:

Wis JI-Criminal 950 includes (1) and (2) in narrative form, without breaking them down into a list. It also includes a statement containing the rule in (3). After identifying these three factors, the Williams decision then quotes and cites with apparent approval the paragraph from Wis JI-Criminal 950 that explains how to decide whether "reasonable force" was used. The Committee concluded that because the concepts were covered in the instruction, it was not necessary to include them in list form.

5. This paragraph is intended to describe the general "reasonable person" standard in the context of the privilege of child discipline. It was cited with apparent approval in State v. Kimberly B., 2005 WI 115, ¶32, 283 Wis.2d 731, 699 N.W.2d 641. It differs slightly from the statement typically used (see, for example, Wis JI-Criminal 800, Privilege: Self-Defense) because the statutory definition does not directly state the privilege in terms of "reasonably believes." Rather, the statute refers to "reasonable discipline" and defines it as "only such force as a reasonable person believes is necessary," adding a step to the process of reasoning.

Section 118.31 addresses corporal punishment in schools, generally forbidding it, with some exceptions. Assuming that a school teacher would be considered a "person responsible for the child's welfare," the Committee concluded that § 118.31 would not be the source of any additional substantive rights or limitations relating to the privilege of reasonable discipline. Its provisions may be relevant to evaluating what may be considered "reasonable" in the use of force to impose discipline in the school setting.

Section 118.31 was amended by 1999 Wisconsin Act 137 by adding a new sub. (7):

(7) Nothing in this section abrogates or restricts any statutory or common law defense to prosecution for any crime.

As to "statutory" defenses, this section seems to confirm the Committee's conclusion that § 118.31 would not be the source of any additional substantive rights or limitations relating to the privilege of reasonable discipline. As to a common law defense, the only case law authority explaining the common law defense of discipline by a teacher is Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925). The Steber decision was the primary resource for the original version of Wis JI-Criminal 950.

6. This paragraph was included in previous versions of Wis JI-Criminal 950. Because the 1989 revision of the definition of the privilege did not change the general standard of reasonableness, the Committee concluded it was appropriate to include this list of factors to consider.

7. This rule is explicitly set forth in § 939.45(5)(b), supra.

This provision apparently has the effect of limiting the application of the privilege to those crimes that do not have an element of intent to cause great bodily harm or engaging in conduct which creates an unreasonable risk of great bodily harm.

For example, a person charged with physical abuse of a child under § 948.03(2)(a), intentionally causing great bodily harm, would not be entitled to an instruction on the privilege of reasonable discipline — the law defining the privilege provides that it is never reasonable discipline to use force intended to cause great bodily harm. If the state proves the elements of the crime, including intent to cause great bodily harm, the state has also proved that the privilege cannot apply.

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The situation with respect to other types of physical abuse under § 948.03 is less clear. Subsection (2)(c) prohibits intentionally causing bodily harm by conduct which creates a high probability of great bodily harm. Is "high probability" in that section the equivalent of "unreasonable risk" in § 939.45(5)? As a general matter, both statements are part of the concept of recklessness and refer to different things. "High probability" refers to the likelihood that the harm will occur, while "unreasonable risk" refers to whether there is any reason for the conduct, that is, whether it has any social utility. The two aspects are separately stated in the standard definition of "criminal recklessness" in § 939.24 which refers to "unreasonable and substantial risk." ("Substantial" was adopted by the homicide revision as a substitute for "high probability.")

Section 939.45(5)(a)2 as originally enacted stated that "great bodily harm" has the meaning provided in § 948.01(4) which in fact defines "sadomasochistic abuse." This was believed to be an inadvertent drafting error, which was corrected by 1989 Wisconsin Act 31 (Section 2825h), which deleted subsection (5)(a)2. The definition of "great bodily harm" in § 939.22(14) applies. See Wis JI-Criminal 914 for a suggested definition.

8. The number of elements for the offense should be stated in the blank. If the offense has a simple title, the title should be used in place of "this offense." But many of the crimes to which this privilege may be relevant are likely to have long titles — for example, "physical abuse of a child: intentionally causing great bodily harm" — making it advisable to use "this offense" instead of the title.

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951 PRIVILEGE: DISCIPLINE BY A PERSON RESPONSIBLE FOR THE WELFARE OF A CHILD: CASES INVOLVING RECKLESSNESS — § 939.45(5)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 951 was originally published in 1989 and revised in 1994, 1996, and 2005. It was withdrawn in 2014.

This instruction tailored the privilege of parental discipline for cases involving recklessness. The Committee concluded that Wis JI-Criminal 950, originally tailored for cases involving intentional causing of harm, was suitable for use in all cases. Therefore, Wis JI-Criminal 951 was withdrawn.

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955 PRIVILEGE: DISCIPLINE BY ONE IN THE PLACE OF THE PARENT — § 939.45(5)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 955 was originally published in 1966 and revised in 1987. It was withdrawn in 1989.

This instruction is withdrawn because of changes made in the definition of the privilege of parental discipline by 1987 Wisconsin Act 332. That Act amended § 939.45(5) to refer to discipline by a "person responsible for the child's welfare" rather than by a "parent or a person in the place of a parent." See Wis JI-Criminal 950 and 951, which will cover all cases involving discipline by a person responsible for a child's welfare for crimes committed on or after July 1, 1989.

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980 LIFETIME SUPERVISION OF SERIOUS SEX OFFENDERS — § 939.615

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant committed the crime of (name offense) but also that one of the defendant's purposes for committing that crime was the defendant's sexual arousal or gratification.

If you find the defendant guilty of (name offense), you must answer the following question:

"Did the defendant commit the crime of (name offense) for the defendant's sexual arousal or gratification?"

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 980 was originally published in 1999 and revised in 2003 and 2007. This revision was approved by the Committee in June 2015; it updated the Comment to reflect changes made by 2013 Wisconsin Act 362.

Section 939.615 was created by 1997 Wisconsin Act 275; the statute applies to offenses committed on or after its effective date: June 26, 1998. It provides for lifetime supervision of persons convicted of certain "serious sex offenses." If a prosecutor seeks lifetime supervision, notice must be included in the charging document "before or at arraignment and before acceptance of any plea." See § 973.125.

Subsection (1)(b)1. of § 939.615 lists offenses that are always considered "serious sex offenses." Lifetime supervision may be ordered following conviction for these offenses without requiring new factual findings by the jury; the court needs to determine "that lifetime supervision of the person is necessary to protect the public." § 939.615(2)(a). 2005 Wisconsin Act 277 [effective date: April 20, 2006] amended the

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list of offenses in § 939.615(1)(b)1. to include § 948.085 Sexual assault of a child placed in substitute care, an offense created by Act 277.

Subsection (1)(b)2. of § 939.615 provides a second basis for ordering lifetime supervision:

> A violation, or the solicitation, conspiracy or attempt to commit a violation, under ch. 940, 942, 943, 944 or 948 other than a violation specified in subd. 1., if the court determines that one of the purposes for the conduct constituting the violation was for the actor's sexual arousal or gratification.

Reference to Chapter 942 was added to § 939.615(1)(b)2. by 2013 Wisconsin 362 [effective date: April 25, 2014].

This second basis is the option addressed by this instruction. An instruction is necessary because § 939.615(2)(c) provides that "the court shall direct that the trier of fact find a special verdict as to whether the conduct constituting the offense was for the actor's sexual arousal or gratification."

The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> > "Did the defendant commit the crime of _(name offense)_ for the defendant's sexual arousal or gratification?"

Subsection (7) of § 939.615, as amended by 2001 Wisconsin Act 109, provides that it is a Class I felony if a person violates a condition of lifetime supervision by conduct that constitutes a felony. There is not a uniform instruction for that offense.

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983 COMMITTING A DOMESTIC ABUSE CRIME WITHIN 72 HOURS OF ARREST — § 939.621(1)(a) and (2)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information[1] alleges not only that the defendant committed the crime of (identify crime) but also that the crime was an act of domestic abuse committed during the 72 hours immediately following the defendant's arrest for a domestic abuse incident.

If you find the defendant guilty, you must answer the following question:

"Was the crime of (identify crime) an act of domestic abuse and did the defendant commit it during the 72 hours immediately following an arrest for a domestic abuse incident?"

Before you may answer this question "yes," you must find the following beyond a reasonable doubt:

(1) that the defendant was previously arrested for a domestic abuse incident;

(2) that the crime of (identify crime) charged in this case was an act of domestic abuse; and

(3) that the defendant committed the crime of (identify crime) charged in this case during the 72 hours immediately following the previous arrest.[2]

For a crime to constitute an act of "domestic abuse" two things are required.

First, it must involve

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE:[3]

[intentional infliction of physical pain, physical injury, or illness.]

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[intentional impairment of physical condition.]

[(first) (second) (third) degree sexual assault.][4]

[a physical act that may cause the other person reasonably to fear imminent engagement in (identify conduct described under § 968.075(1)(a) 1., 2., or 3.)].

Second, it must have been engaged in by an adult person (against his or her spouse or former spouse) (against an adult with whom the person resided or had formerly resided) (against an adult with whom the person has a child in common).

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE

[The victim of the domestic abuse crime charged in this case does not have to be the same as the victim of the domestic abuse incident that resulted in the previous arrest.][5]

If you are satisfied beyond a reasonable doubt that the crime of (identify crime) was an act of domestic abuse and that the defendant committed it during the 72 hours immediately following an arrest for a domestic abuse incident, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 983 was originally published in 1997 and revised in 2003 and 2013. The 2013 revision reflected changes made by 2011 Wisconsin Act 277. This revision was approved by the Committee in February 2014; it reordered the two parts of the definition of "domestic abuse" and modified the caption and the Comment.

Section 939.621 was created by 1987 Wisconsin Act 346. It was amended by 1995 Wisconsin Act 304 to extend the time period from 24 to 72 hours. (Effective date: May 16, 1996.) The statute was not affected by 2001 Wisconsin Act 109, which repealed several penalty-enhancing statutes. Section 939.621 provides for a penalty increase of up to two years if a person is a "domestic abuse repeater." The statute also provides that the penalty increase "changes the status of a misdemeanor to a felony."

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Section 939.621 was amended by 2011 Wisconsin Act 277 [effective date: April 24, 2012]. Before being amended, the statute applied only to those who committed a second domestic abuse crime during the 72 hours immediately following an arrest for a domestic abuse incident. That provision is now found in § 939.621(1)(a). Act 277 added a second basis for the penalty increase, being a "domestic abuse repeater" — see § 939.621(1)(b) and Wis JI-Criminal 984.

> . . . convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055(1) or waived a domestic abuse surcharge pursuant to s. 973.055(4), during the 10-year period immediately prior to the commission of the crime for which the person presently is being sentenced, if the convictions remain of record and unreversed.

This instruction is drafted for a case where § 939.621(1)(a) applies — committing a second domestic abuse crime within 72 hours of release following an arrest for a domestic abuse incident. This is an issue for the jury because it provides for an increased penalty based on facts not covered by the offense definition of the crime to which the added penalty is being applied. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.)

The Committee concluded that § 939.621(1)(a) requires two findings: that the crime charged was "an act of domestic abuse"; and that the crime charged was committed during the 72 hours immediately following the defendant's arrest for another act that constituted a domestic abuse incident. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> > "Was the crime of _____ an act of domestic abuse and did the defendant commit it during the 72 hours immediately following an arrest for a domestic abuse incident?"

1. Section 939.621(2) provides that the penalty increase "changes the status of a misdemeanor to a felony." Thus, there will always have been an information, even if the underlying offense would have been a misdemeanor in the absence of the penalty increase.

2. The definition of this penalty-increasing provision requires that the previous arrest and the commission of the new domestic abuse crime occurred within a 72-hour period. If there is a conflict in the evidence regarding when the previous arrest occurred, definition of "arrest" may be required. The Committee's advice is to use the definition that Wisconsin courts apply in the Fourth Amendment context. In State v. Swanson, 164 Wis.2d 437, 446, 475 N.W.2d 148 (1991) the court "abrogated" the subjective test for an arrest and adopted an objective test: "The standard generally used to determine the moment of arrest in a constitutional sense is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances."

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3. The definition of "domestic abuse" is provided in § 968.075(1)(a). The Committee recommends selecting the parts of the definition that apply.

4. The statute uses the phrase "a violation of § 940.225(1), (2), or (3)" to describe this option. The Committee concluded that the titles of those offenses should be used rather than the statute numbers.

5. This is stated in § 939.621(2).

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984 COMMITTING A DOMESTIC ABUSE CRIME AS A DOMESTIC ABUSE REPEATER — § 939.621(1)(b) and (2)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information[1] alleges not only that the defendant committed the crime of (identify crime) but also that the crime was an act of domestic abuse.

If you find the defendant guilty, you must answer the following question:

"Was the crime of (identify crime) an act of domestic abuse?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the crime of (identify crime) charged in this case was an act of domestic abuse.

For a crime to constitute an act of "domestic abuse" two things are required.

First, it must involve

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE:[2]

[intentional infliction of physical pain, physical injury, or illness.]

[intentional impairment of physical condition.]

[(first) (second) (third) degree sexual assault.][3]

[a physical act that may cause the other person reasonably to fear imminent engagement in (identify conduct described under § 968.075(1)(a) 1., 2., or 3.)].

Second, it must have been engaged in by an adult person (against his or her spouse or former spouse) (against an adult with whom the person resided or had formerly resided) (against an adult with whom the person has a child in common).

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If you are satisfied beyond a reasonable doubt that the crime of (identify crime) was an act of domestic abuse, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 984 was originally published in 2014. This revision updated the Comment and was approved by the Committee in October 2015.

Section 939.621 was created by 1987 Wisconsin Act 346. It provides for a penalty increase of up to two years if a person is a "domestic abuse repeater." The statute also provides that the penalty increase "changes the status of a misdemeanor to a felony."

Section 939.621 was amended by 2011 Wisconsin Act 277 [effective date: April 24, 2012]. Before being amended, the statute applied only to those who committed a second domestic abuse crime during the 72 hours immediately following an arrest for a domestic abuse incident. That provision is now found in § 939.621(1)(a). See Wis JI-Criminal 983. Act 277 added a second basis for the penalty increase, described as follows in § 939.621(1)(b):

> . . . convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055(1) or waived a domestic abuse surcharge pursuant to s. 973.055(4), during the 10-year period immediately prior to the commission of the crime for which the person presently is being sentenced, if the convictions remain of record and unreversed.

There are two parts to the finding required for enhancing the penalty under § 939.621(1)(b) and (2), one of which must go to the jury and one which does not. First, under § 939.621(2), the present conviction must be for a crime that is "an act of domestic abuse, as defined in s. 968.075(1)(a)." This an issue for the jury because it provides for an increased penalty based on facts not covered by the offense definition of the crime to which the added penalty is being applied. Second, under § 939.621(1)(b), the defendant must have been convicted on two separate occasions of a crime for which a domestic abuse surcharge was imposed under § 973.055(4). The Committee concluded that this fact need not be submitted to the jury because it relates solely to prior convictions. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) The Committee concluded that the Apprendi exception applies even though the prior convictions must be for violations subject to the domestic abuse surcharge, which could be characterized as a fact that goes beyond the mere fact of a conviction. This appears to be the same as the prior convictions, refusals, etc., that are the basis for increased penalties for operating under the influence or with a prohibited alcohol concentration: those must be priors that are counted under § 343.307, but their existence is determined by the court, not the jury.

In an unpublished opinion, the Wisconsin Court of Appeals reversed a conviction for disorderly conduct as both a repeater and a domestic abuse repeater. The decision concluded that the trial court erred in not instructing the jury to determine whether the underlying conduct qualified as an act of domestic abuse under

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§ 939.621(1)(b) — the domestic abuse repeater statute. The court held that it is a jury issue because it increases the maximum penalty for the underlying crime. The decision cites Wis JI-Criminal 984 in footnote 3 of the decision. State v. Johnson, Wis. Ct. App No. 2014AP2888-CR [not published — cited for persuasive value]. Note: Wis JI-Criminal 984 was published in 2014; Johnson's trial took place in May 2013.

For the purposes of § 939.621(1)(b), "it is immaterial that the sentence [for the prior conviction] was stayed, withheld or suspended, or that the person was pardoned, unless the person was pardoned on the ground of innocence." Further, § 939.621(2) states: "The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the prior arrest or conviction."

As with similar provisions, the Committee recommends that the penalty-increasing fact be submitted to the jury as a special question following the instruction for the charged crime. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Was the crime of _____ an act of domestic abuse?"

1. Section 939.621(2) provides that the penalty increase "changes the status of a misdemeanor to a felony." Thus, there will always have been an information, even if the underlying offense would have been a misdemeanor in the absence of the penalty increase.

2. The definition of "domestic abuse" is provided in § 968.075(1)(a). The Committee recommends selecting the parts of the definition that apply.

3. The statute uses the phrase "a violation of § 940.225(1), (2), or (3)" to describe this option. The Committee concluded that the titles of those offenses should be used rather than the statute numbers.

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985 CRIMINAL GANG CRIMES — § 939.625

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (offense charged) but also that the defendant did so for the benefit of, at the direction of, or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members.

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of (offense charged) [1] for the benefit of, at the direction of, or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members?"

Before you may answer this question "yes," the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements are present.

The first element requires that the defendant committed the crime of (offense charged) for the benefit of, at the direction of, or in association with a criminal gang.

"Criminal gang" requires proof of all of the following:[2]

(1) an ongoing organization, association, or group of three or more persons, whether formal or informal;

(2) that has a common name or a common identifying sign or symbol;

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(3) that has as one of its primary activities the commission of one or more of the following criminal acts: (specify crime or crimes listed in § 939.22(21)(a) to (s) ; and

(4) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

"Pattern of criminal gang activity" means the commission[3] of two or more of the following crimes within three years of one another: (specify crime or crimes listed in § 939.22(21)(a) to (s) .[4]

These crimes must have been committed either on separate occasions or, if committed on the same occasion, by two or more persons.

[The crime of (specify crime or crimes listed in § 939.22(21)(a) to (s) requires. . . .][5]

The second element requires that the defendant committed the crime of (offense charged) with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members.[6] This requires that the defendant acted with the purpose to promote, further, or assist criminal gang members in committing crimes.

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (offense charged) for the benefit of, at the direction of, or in association with any criminal gang, and with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 985 was originally published in 1996. This revision was approved by the Committee in February 2003.

Section 939.625 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. Wis JI-Criminal 985 is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.625 have been recast as an aggravating factor to be considerted in imposing a sentence. See § 973.017(3)(c).

1. Here insert the name of the offense charged. It would be possible for the jury to find the defendant guilty of a lesser included offense. If a lesser included offense is submitted, and if the evidence supports a finding that it was a gang crime, the instruction should be changed to read: "Did the defendant commit the crime of [charged crime] or a lesser included offense for the benefit of . . ."

2. The definition is based on the one provided in § 939.22(9).

3. The instruction selects "commission of" crimes from the statutory alternatives which include "attempt to commit" and "solicitation to commit." The selection was made in an attempt to simplify the instruction and make it more understandable. If attempts or solicitations are involved, the model must, of course, be modified.

4. The concluding portion of the definition of "criminal gang" in § 939.22(9) refers to engaging in "a pattern of criminal gang activity." "Pattern of criminal gang activity" is in turn defined in § 939.22(21) as committing two or more of the crimes listed in the definition within three years of one another and on separate occasions or by two or more person. The instruction builds in this definition without separately referring to the "pattern of criminal gang activity."

"Pattern" is also used in Wisconsin's "RICO" statute. See § 946.83. Wis JI-Criminal 1881, at footnote 4, includes a discussion of the principles found inherent in the concept of "pattern" in decisions of the United States Supreme Court interpreting the federal RICO statute.

5. Because the definition of "gang activity" includes the requirement that particular crimes have been committed, it appears to be necessary for the jury to find that those crimes were in fact committed. It may be helpful to refer to the uniform jury instruction for the offense or offenses involved for a summary of the elements or a more complete description of the elements, as needed.

In an analogous situation, the Wisconsin Court of Appeals held that it was error to fail to instruct sufficiently on the crime committed against the victim where the charge was intimidation of a victim under § 940.44. That statute requires the target of the intimidation be a "victim," defined as a "person against whom any crime . . . has been perpetrated . . ." The jury in a case involving this charge "should have been told that it could not find the defendant guilty . . . unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt." State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991) [discussed in footnote 8, Wis JI-Criminal 1294].

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6. "Criminal gang member" is defined in § 939.22(9g) as "any person who participates in criminal gang activity, as defined in s. 941.38(1)(b), with a criminal gang." A definition combining these statutes might read as follows:

> "Criminal gang member" means a person who commits, attempts to commit, or solicits another to commit one or more of the following crimes, committed for the benefit of, at the direction of or in association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by criminal gang members: (specify crime or crimes listed in § 941.38(1)(b) .

The Committee concluded that separately defining "criminal gang member" in the instruction was unnecessary, since the "gang members" being referred to are those the defendant allegedly intended to assist, etc. The jury is likely to have a common understanding of "gang member" that is not helped by the elucidation attempted in the statutes. To the extent there is a difference, the common understanding is probably more limited, and thus to the defendant's advantage, than the statutory definition. The latter does not appear to require that the persons be "members" of a gang in the common meaning of the term; it is sufficient that they be involved in crimes intended to benefit a gang.

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990 USING OR POSSESSING A DANGEROUS WEAPON — § 939.63

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint)[1] alleges not only that the defendant committed the crime of _____ but also that the defendant did so while (using) (threatening to use) (possessing) a dangerous weapon.

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of _____ while (using) (threatening to use) (possessing)[2] a dangerous weapon?"

"Dangerous weapon" means[3]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.][4]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant committed the crime while [(using) (threatening to use) a dangerous

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weapon.] [possessing a dangerous weapon and possessed the dangerous weapon to facilitate the crime.][5]

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 990 was originally published in 1980 and revised in 1990, 1994, 1996, 1997, and 2003. This revision made editorial corrections in the Comment and footnote 3.

See Wis JI-Criminal 910 for a complete definition of "dangerous weapon" and discussion of relevant case law.

Section 939.63 was revised by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The basic penalty-enhancing provision was retained, but subs. (2) and (3), which provided for a "presumptive minimum sentence," were repealed. After revision, § 939.63(1) provides for the following increased penalties if a person commits a crime specified under chapters 939 to 951 and 961 while possessing, using, or threatening to use a dangerous weapon.

(a) The maximum term of imprisonment for a misdemeanor may be increased by not more than 6 months.
(b) If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years. [This applies to felonies in Classes A through H.]
(c) If the maximum term of imprisonment for a felony is more than 2 years, but not more than 5 years, the maximum term of imprisonment for the felony may be increased by not more than 4 years. [There are no classified felonies with a maximum of more than 2 years, but not more than 5 years.]
(d) The maximum term of imprisonment for a felony not specified in par. (b) or (c) may be increased by not more than 3 years. [This applies to Class I felonies, which have a maximum term of imprisonment of 3 years and 6 months.]

Section 973.01(2)(c), as created by 2001 Wisconsin Act 109, specifies the order in which penalty enhancement statutes are to be applied, including § 939.63.

The increased penalty provided by this statute does not apply if possessing, using, or threatening to use a dangerous weapon is an essential element of the crime charged. Section 939.63(2). In State v. Robinson, 140 Wis.2d 673, 412 N.W.2d 535 (Ct. App. 1987), the court of appeals held that the "possessing a dangerous weapon" penalty enhancer found in § 939.63 can be applied to the offense of (unarmed) robbery under § 943.32(1). Apparently, confusion on the part on the victim about exactly when Robinson pulled out the gun led the prosecutor to elect this charging scheme instead of simply charging armed robbery. The court found no ambiguity in the statute: § 939.63(1)(b), 1987 Wis. Stats., provides that the dangerous weapon penalty increase applies as long as possessing or using a weapon is not an essential element of the crime charged. This does not result in any conflict with the definition of armed robbery, because the two statutes

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apply to different conduct. Armed robbery requires using or threatening to use the dangerous weapon. Section 939.63 is violated if a person merely possesses a dangerous weapon during a crime.

Applying § 939.63 to a misdemeanor does not change the misdemeanor to a felony, and no preliminary examination is required. State v. Denter, 121 Wis.2d 118, 357 N.W.2d 555 (1984).

The Committee recommends that the "use of a dangerous weapon" issue be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).
>
> We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

> "Did the defendant commit the crime of _____ while (possessing) (using) (threatening to use) a dangerous weapon?"

When the provision in § 939.63 is invoked, it is not only a penalty enhancer, it is also an element of the crime charged. State v. Villarreal, 153 Wis.2d 323, 329, 450 N.W.2d 519 (Ct. App. 1989), citing State v. Carrington, 130 Wis.2d 212, 222, 386 N.W.2d 512 (Ct. App. 1986), reversed on other grounds, 134 Wis.2d 260, 397 N.W.2d 484 (1986). The Wisconsin Supreme Court confirmed that the "use of a dangerous weapon" provision, when charged, becomes an element of the crime. State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994). See note 3, below. However, this is not inconsistent with submitting use of a dangerous weapon as a special question as recommended in this instruction. "The procedure suggested by the committee merely provides a convenient and efficient means of determining whether the accused has committed only the underlying crime or the greater crime with the added element." Villarreal, 153 Wis.2d 323 at 330.

The Villarreal court also noted that it "had no disagreement with" the suggestion made in the comment of the 1980 version of this instruction that the parties could agree to have the judge rather than the jury decide the use of a weapon issue. However, the court noted that if that approach is taken, there must be a personal waiver by the defendant of the right to a jury trial on the use of a weapon element.

1. The prosecutor's intention to seek the enhanced penalty authorized by § 939.63 should be disclosed by alleging the use of a weapon in the information or complaint. Section 939.63 may not be applied to any offense which has as an element the use or possession of a dangerous weapon.

2. See Wis JI-Criminal 920 for a definition of "possession."

3. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

4. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the

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dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

Wis JI-Criminal 990 was revised after Tomlinson to include all the statutory alternatives in the text of the instruction. Using the alternative involved in that case would result in the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

5. This alternative is intended to reflect the decision in State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994), where the Wisconsin Supreme Court held that a "nexus" must be established between the predicate offense and the "possession" of a dangerous weapon before the penalty enhancer in § 939.63 can apply. Further, the jury must be instructed on the nexus.

Police executed a search warrant at the home of Peete's girlfriend. They found cocaine, cash, a beeper, and Peete's clothes in one of the bedrooms. A loaded handgun was found stuffed between the mattresses in that bedroom. Three other handguns were found in a cereal box in the kitchen pantry. Peete was charged with possession of cocaine with intent to deliver while possessing a dangerous weapon. He was convicted and appealed.

The court first held that "possession" includes "constructive possession" and cited the definition in Wis JI-Criminal 920 with approval.

The court also held that § 939.63 is intended to apply only where there is a relationship or "nexus" between the weapon and the substantive crime. Further, the jury must be instructed on this requirement. The court adopted a definition offered by the state:

> when a defendant is charged with committing a crime while possessing a dangerous weapon . . . the state should be required to prove that the defendant possessed the weapon to facilitate commission of the predicate offense.

185 Wis.2d 4, 18.

The court held that the "nexus" is always present where the offense involves using or threatening to use a weapon. Further definition is need only in "possessing" cases.

Peete did not offer a general definition of "facilitate." If one is desired, the Committee believes

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something like the following would be correct:

> Possession of a dangerous weapon facilitates the commission of a crime when the possession is with the intent to use the weapon if the need arises, for example, to protect the defendant, to protect contraband, or to make an escape possible.
>
> Possession does not facilitate a crime if it is accidental, coincidental or entirely unrelated to the crime.

This is based on examples offered in the Peete decision. See 185 Wis.2d 4, 18. Also see Smith v. United States, 110 S. Ct. 2050 (1993), interpreting 18 U.S.C. § 924, a federal statute similar to § 939.63.

In State v. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997), the Wisconsin Supreme Court extended the nexus requirement to a case where the gun was in the personal possession of a person arrested for delivery of cocaine. The court held that the jury must still make a factual finding that the defendant possessed the gun to facilitate the crime. The court also held that the Peete requirement applied retroactively.

The Peete requirement was interpreted in State v. Page, 2000 WI App. 267, ¶13,240 Wis.2d 276, 622 N.W.2d 285:

> Under the correct reading of Peete, if the evidence is such that a reasonable jury may find beyond a reasonable doubt that the defendant possessed a dangerous weapon in order to use it or threaten to use it should that become necessary, the evidence is sufficient under § 939.63 even if the defendant did not actually use or threaten to use the weapon in the commission of the crime.

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992 VIOLENT CRIME IN A SCHOOL ZONE — § 939.632

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (name violent crime)[1] but also that the defendant committed that crime in a school zone.

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of (name violent crime) in a school zone?"

"School zone" means[2]

[(on) (within 1,000 feet from) the premises of a school.]

[on a school bus[3] or public transportation transporting students to and from a public, private, or tribal school.[4]]

[at school bus[5] stops where students are waiting for a school bus or are being dropped off by a school bus.]

["School" means a public, parochial, private, or tribal school[6] that provides an educational program for one or more grades between grades 1 and 12 and that is commonly known as an elementary school, middle school, junior high school, senior high school or high school.[7] "School premises" means any school building, grounds, recreation area or athletic field or any other property owned, used or operated for school administration.[8]]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name violent crime) in a school zone, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 992 was originally published in 1995 and revised in 2003 and 2008. This revision was approved by the Committee in February 2012; it involved adding reference to "tribal school" to the text and updating the comment.

Section 939.632 was not affected by 2001 Wisconsin Act 109, which repealed several penalty-enhancing provisions.

Section 939.632 was created by 1995 Wisconsin Act 22 (effective date July 14, 1995). It provides for the following increase in penalties if a person commits one of numerous specified "violent crimes" in a school zone:

– if the violent crime is a felony, the maximum term of imprisonment is increased by 5 years.

– if the violent crime is a misdemeanor, the maximum term of imprisonment is increased by 3 months, and the place of imprisonment is specified as the county jail.

The statute specifies that "the court shall direct that the trier of fact find a special verdict as to" whether the violent crime was committed in a school zone. See § 939.632(4).

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of_____, under Wis. Stat. § _____, at the time and place charged in the (information)(complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ in a school zone?"

The constitutionality of § 939.632 was challenged in State v. Quintana, 2008 WI 33, 308 Wis.2d 615, 748 N.W.2d 447 [affirming 2007 WI App 29, 299 Wis.2d 234, 729 N.W.2d 776] by a defendant who lived within 1,000 feet of school and was charged with the enhanced penalties in connection with crimes committed in his home. The court held that § 939.632 was constitutional as applied to Quintana because the 1,000 foot perimeter is a reasonable distance to accomplish the legislative goal of deterring violent crime near schools. ¶2.

A similar provision increases the penalty for delivering a controlled substance while on or within 1,000 feet of school (and certain other designated) premises. See § 961.49 and Wis JI-Criminal 6004.

1. The "violent crimes" to which § 939.632 applies are listed in subsection (1)(e).

2. The alternatives provided are given as definitions of "school zone" in subsec. (1)(d)1. through 3m. of § 939.632.

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3. "School bus" is defined in § 340.01(56); the definition applies to this offense, see § 939.632(1)(b).

4. "Tribal school" is defined in § 115.001(15m).

5. See note 3, supra.

6. "Tribal school" is defined in § 115.001(15m).

7. This is the definition provided in § 939.632(1)(a).

8. This is the definition provided in § 939.632(1)(c).

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993 WEARING A BULLETPROOF GARMENT — § 939.64

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information[1] alleges not only that the defendant committed the crime of _____ but also that the defendant did so while wearing a bulletproof garment.

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of _____ while wearing a bulletproof garment?"

"Bulletproof garment" means a vest or other garment designed, redesigned, or adapted to prevent bullets from penetrating through the garment.[2]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of _____ while wearing a bulletproof garment, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 993 was originally published in 1998. This revision was approved by the Committee in February 2003.

Section 939.64 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.64 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(3)(d).

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Section 939.64 was created by 1983 Wisconsin Act 478. It provides for a penalty increase of up to ten years if a person commits a felony while wearing a bulletproof garment. 1995 Wisconsin Act 340 amended the statute by increasing the penalty enhancement from 5 to 10 years. (Effective date: June 1, 1996.)

As with similar provisions that increase the maximum penalty for a criminal offense, the Committee concluded that the penalty-increasing facts should be submitted to the jury as a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ while wearing a bulletproof garment?"

1. Section 939.64 applies only to felonies. See § 939.64(2).

2. This is the definition provided in § 939.64(1).

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994 CONCEALING IDENTITY — § 939.641

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of _____ but also that he did so while his appearance was (concealed) (disguised) (altered)[1] with the intent to make it less likely that he would be identified with that crime.

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of _____ while (concealing) (disguising) (altering) his identity with intent to make it less likely that he would be identified with that crime?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that both of the following facts were established:

First, that the defendant's appearance was (concealed) (disguised) (altered) at the time that he committed the crime of _____; and

Second, that the defendant so (concealed) (disguised) (altered) his appearance with the intent to make it less likely that he would be identified with the crime of _____. This means that he must have had the purpose to make it less likely that he would be identified with the crime of _____.[2] You cannot look into the mind of the defendant to

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find intent. Rather you must find it, if you find it at all, from acts and words and statements bearing on such intent.

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of _____ while his appearance was (concealed) (disguised) (altered) and that he so (concealed) (disguised) (altered) his appearance with the intent to make it less likely that he would be identified with the crime of _____, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 994 is Wis JI-Criminal 1805 (© 1981) renumbered. Wis JI-Criminal 1805 was originally published in 1974; it was revised in 1979 and 1981. It was republished as Wis JI-Criminal 994 in 1986 and revised in 1990. This revision was approved by the Committee in February 2003.

Section 939.641 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.641 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(3)(a).

The renumbering of the instruction in 1986 followed the renumbering of the statute from § 946.62 to § 939.641 by 1985 Wisconsin Act 104 (effective date: November 28, 1985). The renumbering of the statute clarifies the status of "concealing identity" by placing it in the section of the Criminal Code that contains other penalty-increasing factors like using a weapon (§ 939.63) and using a bulletproof garment (§ 939.64).

This statutory change concluded the process of clarifying the status of "concealing identity" as a factor that increases the penalty for the underlying crime as opposed to constituting a separate criminal offense. The 1974 and 1979 versions of Wis JI-Criminal 1805 characterized concealing identity as a separate offense, upon conviction for which the defendant could have received a consecutive or concurrent sentence. This characterization was no longer correct in light of the decision of the Wisconsin Supreme Court in Robinson v. State, 102 Wis.2d 343, 306 N.W.2d 668 (1981), which held that concealing identity may not be charged as a separate crime or be punished by imposing a separate sentence. The 1981 version of Wis JI-Criminal 1805 reflected the court's conclusion in Robinson.

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The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ while (concealing) (disguising) (altering) his identity with intent to make it less likely that he would be identified with that crime?"

1. While the usual method of disguise is the wearing of a mask, the section is broad enough to cover the use of other means of concealing, disguising, or altering one's usual appearance to make it less likely to be identified with a crime. See Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 197 (February 1953).

The Committee concluded that the terms "concealed, disguised, and altered" are used in § 946.62 as synonyms, not to describe conceptually distinct acts. In instructing the jury, the word should be selected which most accurately describes the defendant's alleged conduct. If it is necessary to use more than one term in the instruction, the Committee concluded that the jury need not be instructed that they must unanimously agree on which term applies.

One may be found guilty, as a party to the crime, of committing a crime with identity concealed when he himself was not masked during the commission of the crime. Schroeder v. State, 96 Wis.2d 1, 291 N.W.2d 460 (1980).

2. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changed from "believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

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996 SELECTING THE PERSON AGAINST WHOM A CRIME IS COMMITTED BECAUSE OF RACE, RELIGION, ETC. — § 939.645

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of _____[1] but also that he intentionally selected the person against whom the crime was committed in whole or in part because of the defendant's belief or perception regarding the race[2] of that person.

If you find the defendant guilty, you must answer the following question:[3]

"Did the defendant intentionally select the person against whom the crime of _____ was committed because of the race of that person?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant intentionally[4] selected (name of victim) as the victim of the crime of _____ in whole or in part because of the defendant's belief or perception regarding (name of victim)'s race, whether or not that belief or perception was correct.[5]

If you are satisfied beyond a reasonable doubt that the defendant intentionally selected (name of victim) as the person against whom the crime of _____ was committed because of his belief or perception regarding the race of (name of victim), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 996 was originally published in September 1988 and revised in 1990. It was withdrawn in June 1992 and republished in 1993. This revision was approved by the Committee in February 2003 and involved adding reference to 2001 Wisconsin Act 109 to the comment.

Section 939.645 was retained as a "penalty enhancer" by 2001 Wisconsin Act 109.

This instruction is drafted for the enhancement of penalty provided by § 939.645, Penalty; Crimes Committed Against Certain People or Property. The statute was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. Wis JI-Criminal 996 is drafted for cases involving a crime against the person; Wis JI-Criminal 996A is drafted for cases where the crime is against property. The penalty increase depends on the ordinary penalty for the underlying crime:

- If the penalty for the underlying crime is less than that of a Class A misdemeanor, the revised maximum fine is $10,000 and the maximum term of imprisonment is one year in the county jail.
- If the penalty is ordinarily a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum term of imprisonment is 2 years. NOTE: This changes the status of the crime to a felony.
- If the crime is ordinarily a felony (of any class) the maximum fine may be increased by not more than $5,000 and the maximum term of imprisonment may be increased by not more than 5 years.

Section 939.645(2).

The penalty enhancement does not apply to a crime which already requires proof of the victim's race, etc. § 939.645(4). See, for example, § 943.012, Criminal Damage to Religious and Other Property, also created by 1987 Wisconsin Act 348, and addressed by Wis JI-Criminal 1401A, 1401B, and 1401C.

A brief history of the "hate crimes" statute and its review in the courts follows note 5.

The penalty enhancement under § 939.645 should be alleged in the complaint and information along with the underlying crime. Section 939.645(3) expressly provides that "the court shall direct that the trier of fact find a special verdict as to . . . [the penalty enhancement issue]." This comports with the Committee's usual recommendation that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant intentionally select the person against whom the crime of _____ was committed because of the race of that person?"

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1. Section 939.645 applies only to crimes "under chs. 939 to 948." § 939.645(1)(a).

2. The penalty enhancement provided by § 939.645 applies not only to victims selected because of race but also to victims selected because of "religion, color, disability, sexual orientation, national origin, or ancestry." § 939.645(1)(b). The references to "race" in the instruction must be changed to refer to the appropriate term if one of the other bases for selection is involved.

3. Section 939.645(3) requires the use of a special verdict. See the Comment preceding note 1, supra.

4. Although § 939.645(1)(b) uses the word "intentionally," it apparently does not have its usual meaning. See § 939.23(3). First, the statute's provision that the actor select the victim "in whole or in part" because of status seems to be a lesser standard than the typical "mental purpose" requirement. Second, the context of this offense makes it unlikely that the "aware that his or her conduct is practically certain to cause that result" alternative is likely to apply. Third, the general rule that "intentionally" carries with it a knowledge requirement appears to be superseded by the 1992 amendment of the statute which made "belief or perception" of the victim's status sufficient.

5. The phrase "in whole or in part because of the actor's belief or perception regarding the race . . . whether or not the actor's belief or perception was correct," was added to the statute by 1991 Wisconsin Act 291, effective date: May 14, 1992.

History of the Wisconsin "Hate Crimes" Statute

Section 939.645 was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. It was amended by 1991 Wisconsin Act 291. (See note 5, above.)

The instructions for this offense were originally published in 1988 but were withdrawn in 1992 when the Wisconsin Supreme Court found that the statute was unconstitutional. The instructions were restored in 1993 after the United States Supreme Court reversed the Wisconsin decision.

In State v. Mitchell, 169 Wis.2d 153, 485 N.W.2d 807 (1992), the Wisconsin Supreme Court concluded that § 939.645 unconstitutionally infringed upon free speech by punishing thought rather than conduct. The court focused on the statute's phrasing: "intentionally selects the [victim] . . . because of . . . race. . . .":

> Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection. . . .
>
> While the statute does not specifically phrase the "because of . . . race, religion, color, [etc.]" element in terms of bias or prejudice, it is clear from the history of anti-bias statutes, detailed above, that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law — punishment of offensive motive or thought.

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> .... A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute. The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor — his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional.

169 Wis.2d 153, 167, 170

The court indicated that its decision was supported by the decision of the United States Supreme Court in R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992), which was decided one day before the decision in Mitchell. R.A.V. involved a different approach to the "hate crimes" issue in that the ordinance in question attempted to punish directly speech or other expressive conduct motivated by racial or other discriminatory prejudice: "The ideological context of the thought targeted by the [Wisconsin] hate crimes statute is identical to that targeted by the St. Paul ordinance — racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content." State v. Mitchell, 169 Wis.2d 153, 172.

The United States Supreme Court reversed in Wisconsin v. Mitchell, 113 S.Ct. 2194, decided June 11, 1993. Chief Justice Rehnquist, writing for a unanimous court, held that the Wisconsin version of a "hate crime" statute did not violate First Amendment protections. Although it allows more severe punishment if a victim is selected because of a particular status, the court found this was no different from the standard practice which allows judges to consider a variety of factors in deciding on the sentence to be imposed:

> Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.

The court distinguished the decision in R.A.V., saying that it involved a law aimed at the content of certain communications deemed to be offensive. Mitchell, on the other hand, involves a statute aimed at conduct. Further, said the court,

> ... the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. ... The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

The court also rejected Mitchell's claim that the statute was overbroad, dismissing it as "too speculative." And, the court disagreed with the Wisconsin Supreme Court's conclusion regarding the evidentiary use of speech:

> The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.

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996A SELECTING PROPERTY DAMAGED BECAUSE OF THE RACE, RELIGION, ETC., OF THE OWNER — § 939.645

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of _____[1] but also that he intentionally selected the property damaged[2] by the crime in whole or in part because of the defendant's belief or perception regarding the race[3] of the owner[4] of that property.

If you find the defendant guilty, you must answer the following question:[5]

"Did the defendant intentionally select the property damaged by the crime of _____ because of the race of the owner of that property?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant intentionally[6] selected the property damaged by the crime of _____ in whole or in part because of the defendant's belief or perception regarding the race of the owner of that property, whether or not that belief or perception was correct.[7]

If you are satisfied beyond a reasonable doubt that the defendant intentionally selected the property damaged by the crime of _____ because of his belief or perception regarding the race of the owner of that property, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 996.1 was originally published in September 1988 and revised in 1990. It was withdrawn in June 1992 and republished in 1993. This revision was approved by the Committee in February 2003 when it was renumbered as Wis JI-Criminal 996A. The 2003 revision also added reference to 2001 Wisconsin Act 109 to the comment.

Section 939.645 was retained as a "penalty enhancer" by 2001 Wisconsin Act 109.

This instruction is drafted for the enhancement of penalty provided by § 939.645, Penalty; Crimes Committed Against Certain People or Property. The statute was created by 1987 Wisconsin Act 348, effective date: May 3, 1988. Wis JI-Criminal 996A is drafted for cases involving crimes against property; Wis JI-Criminal 996 is drafted for cases involving crimes against the person.

A brief history of § 939.645 follows note 5, Wis JI-Criminal 996.

The penalty increases depend on the original penalty for the underlying offense. See Comment to Wis JI-Criminal 996.

The penalty enhancement under § 939.645 should be alleged in the complaint and information along with the underlying crime. Section 939.645(3) expressly provides that "the court shall direct that the trier of fact find a special verdict as to . . . [the penalty enhancement issue]." This comports with the Committee's usual recommendation that facts which increase the range of penalties be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the (information) (complaint).
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "Did the defendant intentionally select the property damaged by the crime of _____ because of the race of the owner of that property?"

1. Section 939.645 applies only to crimes "under chs. 939 to 948." § 939.645(1)(a).

2. The statute refers to "property which is damaged or otherwise affected by the crime." § 939.645(1)(b).

3. The penalty enhancement provided by § 939.645 applies not only to victims selected because of race but also to victims selected because of "religion, color, disability, sexual orientation, national origin, or ancestry." § 939.645(1)(b). The references to "race" in the instruction must be changed to refer to the appropriate term if one of the other bases for selection is involved.

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4. The statute refers to "the owner or occupant of that property." § 939.645(1)(b).

5. Section 939.645(3) requires the use of a special verdict. See the Comment preceding note 1, supra.

6. Although § 939.645(1)(b) uses the word "intentionally," it apparently does not have its usual meaning. See note 4, Wis JI-Criminal 996.

7. The phrase "in whole or in part because of the actor's belief or perception regarding the race . . . whether or not the actor's belief or perception was correct," was added to the statute by 1991 Wisconsin Act 291, effective date: May 14, 1992.

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998 VIOLENT CRIME AGAINST AN ELDER PERSON — § 939.647

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the crime of (name violent felony) [1] but also that the defendant committed that crime against an elder person.

If you find the defendant guilty of (name violent felony), you must answer the following question:

"Did the defendant commit the crime of (name violent felony) against a person who was 62 years of age or older?"[2]

Knowledge of the victim's age is not required and mistake about the victim's age is not a defense.[3]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name violent felony) against a person who was 62 years of age or older, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 998 was originally published in 1999. This revision was approved by the Committee in February 2003.

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Section 939.647 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 939.647 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(5).

Section 939.647 was created by 1997 Wisconsin Act 266 (effective date June 25, 1998). It provides for a five-year increase in the maximum penalty if a person commits a specified "violent felony" against an elder person. (See footnote 1 for the list of specified felonies.)

The statute provides that "the court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (2)." See § 939.647(4). Sub. (2) apparently specifies two issues: that the defendant committed a violent felony and that the victim is an elder person. Since this instruction would only be considered by the jury if they found the defendant guilty of one of the specified violent felonies, the Committee concluded that only the victim's status as an elder person need be submitted to the jury in a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ against person who was 62 years of age or older?"

1. The "violent felonies" to which § 939.647 applies are listed in subsection (1)(b) and include the following:

- battery under § 940.19(2), (3), (4), (5), or (6);

- first, second or third degree sexual assault under § 940.225(1), (2), or (3);

- first or second degree reckless injury under § 940.23; and

- robbery under § 943.32.

2. Strictly following the statutory format would mean first stating the term "elder person" and then providing the definition: one who is 62 years of age or older. The Committee concluded that it was more direct simply to ask: Was the victim 62 years of age or older?

3. This is the standard statement that is used in other instructions where the victim's age is an element and is based on the complementary rules stated in §§ 939.23(6) and 939.43(2). Although both of those statutes refer to "the age of a minor," sub. (3) of § 939.647 provides a similar rule for this offense: "Subsection (2) applies even if the person mistakenly believed that the victim had not attained the age of 62 years." The Committee concluded that the standard statement is clearer; no change in meaning is intended.

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999 MINOR PASSENGER IN THE VEHICLE — §§ 346.65(2)(f)2., 346.65(2j)(d), 346.65(3m), 940.09(1b), and 940.25(1b)

CAUTION: THIS INSTRUCTION IS TO BE USED FOR CHARGES UNDER § 940.09(1b) AND § 940.25(1b) ONLY WHEN THE OFFENSES OCCURRED BEFORE FEBRUARY 1, 2003. IT IS TO BE USED FOR CHARGES UNDER § 346.65(2)(f)2., § 346.65(2j)(d), AND § 346.65(3m) REGARDLESS OF THE DATE THE OFFENSE OCCURRED.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the offense of (specify the offense charged) but also that there was a passenger under 16 years of age in the motor vehicle at the time.

If you find the defendant guilty, you must answer the following question:

"Was there a passenger under 16 years of age in the motor vehicle at the time?

If you are satisfied beyond a reasonable doubt that there was a passenger under 16 years of age in the motor vehicle at the time, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 999 was originally published in 1996 and revised in 1999 and 2003. This revision added to the "caution." This revision made changes in the Comment and was approved by the Committee in June 2010.

Sections 940.09(1b) and 940.25(1b) were repealed by 2001 Wisconsin Act 109 (effective date: February 1, 2003). This instruction is to be used for charges under these statutes only when based on conduct occurring before February 1, 2003. The substance of the repealed statutes was recreated as an aggravating factor to be considered at sentencing. See § 973.017(7). The motor vehicle code provisions were not affected by Act 109.

2009 Wisconsin Act 100 created § 346.65(2)(f)1. which makes a first OWI offense a crime if there was a minor passenger under 16 years of age in the vehicle. A separate instruction has been drafted for that offense See Wis JI-Criminal 2663D.

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1995 Wisconsin Act 425 (effective date June 21, 1996), created several statutes that double the maximum penalty for operating while intoxicated offenses that occur while a child under the age of 16 is a passenger in the defendant's vehicle. 1997 Wisconsin Act 295 amended two of these penalty provisions — §§ 940.09(1b) and 940.25(b) — to apply when there is an unborn child in the vehicle. [Effective date: July 1, 1998.] See Wis JI-Criminal 999A.

The penalty provisions are found in the following statute sections:

§ 346.65(2)(f) - applicable to violations of § 346.63(1), operating under the influence or with a prohibited alcohol concentration

§ 346.65(2j)(d) - applicable to violations of § 346.63(5), involving offenses by a person holding a commercial operator's license

§ 346.65(3m) - applicable to violations of § 346.63(2) and (6), involving causing of injury by regular and commercial operators

§ 940.09(1b) - applicable to violations of § 940.09, homicide by intoxicated use of a vehicle
[Repealed by 2001 Wisconsin Act 109.]

§ 940.25(1b) - applicable to violations of § 940.25, injury [great bodily harm] by intoxicated use of a vehicle
[Repealed by 2001 Wisconsin Act 109.]

As with similar provisions that expand the maximum penalty for a criminal offense, the Committee concluded that this penalty-increasing factor should be submitted to the jury as a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____ under Wis. Stat. § ____ at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was there a passenger under 16 years of age in the motor vehicle at the time?"

The instruction, and the suggested verdict, depart from the text of the statute in two respects. First, the statute refers to "minor passenger under 16 years of age." The instruction does not include "minor" because all passengers under age 16 are "minors." Second, the statute refers to the minor or unborn child being in the vehicle "at the time of the violation that gave rise to the conviction." The instruction drops "of the violation that gave rise to the conviction" to simplify the instruction and to avoid confusion that might result from referring to a "conviction." Literally speaking, the conviction does not occur until after the verdict is received.

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999A UNBORN CHILD IN THE VEHICLE — §§ 940.09(1b) and 940.25(1b)

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant committed the offense of (specify the offense charged) but also that there was an unborn child in the motor vehicle at the time.

If you find the defendant guilty, you must answer the following question:

"Was there an unborn child in the motor vehicle at the time?

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[1]

If you are satisfied beyond a reasonable doubt that there was unborn child in the motor vehicle at the time, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 999A was approved by the Committee in March 1999.

Sections 940.09(1b) and 940.25(1b) were repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by §§ 940.09(1b) and 940.25(1b) have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(7).

1995 Wisconsin Act 425 (effective date June 21, 1996), created several statutes that double the maximum penalty for operating while intoxicated offenses that occur while a child under the age of 16 is a passenger in the defendant's vehicle. [See Wis JI-Criminal 999.] 1997 Wisconsin Act 295 amended two of those penalty provisions — §§ 940.09(1b) and 940.25(1b) — to apply when there is unborn child in the vehicle. [Effective date: July 1, 1998.]

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Section 940.09(1b) is applicable to violations of § 940.09, Homicide by intoxicated use of a vehicle; section 940.25(1b) is applicable to violations of § 940.25, Injury [great bodily harm] by intoxicated use of a vehicle. Both of those statutes were amended by 1997 Wisconsin Act 295 to apply to causing the death of (§ 940.09) or great bodily harm to (§ 940.25) an unborn child. The penalty provisions addressed by this instruction apply to violations of those two statutes where the death of or great bodily harm to another person is caused when an unborn child is in the motor vehicle.

NOTE: The 1997-98 Wisconsin Statutes do not reflect the change made in § 940.25(1b) by 1997 Wisconsin Act 295 to include "unborn child." This was an inadvertent omission made in the course of preparing the printed statutes. The original act controls; see § 990.07. Therefore this instruction was drafted to apply to § 940.25(1b) as well as to § 940.09(1b).

As with similar provisions that expand the maximum penalty for a criminal offense, the Committee concluded that this penalty-increasing factor should be submitted to the jury as a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____under Wis. Stat. § ____ at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was there an unborn child in the motor vehicle at the time?"

1. This is the definition provided in § 939.75(1).

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